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MICHAEL RODAK, J

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-794

NATIONAL ASSOCIATION OF MOTOR BUS OWNERS, ET AL.,
Petitioners

v.

CLAUDE S. BRINEGAR, *Secretary of the Department of Transportation*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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CLAUDE S. BRINEGAR, *Secretary of the Department of Transportation*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The National Association of Motor Bus Owners (NAMBO), American Trucking Associations, Inc. (ATA), American Transit Association (Transit) and Milwaukee & Suburban Transport Corporation (Suburban) petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this proceeding.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto as Appendix A, *infra*, at 1a,. No opinion was rendered by the District Court for the District of Columbia. The regula-

tions and accompanying statement of the Federal Highway Administration on regrooved tires also appear in the Appendix hereto as Appendix B, *infra*, at 39a.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on July 26, 1973. A timely petition for rehearing was denied on August 22, 1973 (Appendix D, *infra*, at 52a), and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Section 204(a) of the National Traffic and Motor Vehicle Safety Act of 1966 ("Safety Act"), 15 U.S.C. § 1424(a), which provides that "[n]o person shall . . . deliver for introduction in interstate commerce any tire . . . which has been regrooved," applies to interstate motor carriers of passengers or property who regroove their own tires, specially designed for regrooving, for their own use and not for sale.

2. Whether the Safety Act, whose pertinent purpose, as declared in Section 1 of the Act, 15 U.S.C. § 1381, is "to establish motor vehicle safety standards for motor vehicles and equipment in interstate commerce . . . ," applies to wholly intrastate motor carriers of passengers or property.

STATUTES INVOLVED

The pertinent provisions of the Safety Act and the Interstate Commerce Act are set forth in the Appendix hereto as Appendix C, *infra*, at 47a.

STATEMENT OF THE CASE

Section 204(a) of the Safety Act, 15 U.S.C. § 1424 (a), restricts transactions involving regrooved tires as follows:

> No person shall sell, offer for sale, or introduce for sale or deliver for introduction in interstate commerce, any tire or motor vehicle equipped with any tire which has been regrooved, except that the Secretary [Administrator][1] may by order permit the sale of regrooved tires and motor vehicles equipped with regrooved tires which he finds are designed and constructed in a manner consistent with the purposes of this Act.

Subsection (c) of Section 204 of the Act, 15 U.S.C. § 1424(c), defines "regrooved tires" in these terms:

> For the purposes of this section the term "regrooved tire" means a tire on which a new tread has been produced by cutting into the tread of a worn tire.

Subsection 102(9), 15 U.S.C. § 1391(9), defines "interstate commerce" as follows:

> Interstate commerce means commerce between any place in a State and any place in another State, or between places in the same State through another State.

Acting pursuant to these statutory provisions, the Federal Highway Administrator of the Department of Transportation on January 24, 1968, promulgated regulations on regrooved tires (34 F.R. 1149; Appendix B, *infra,* at 39a). The regulations provide that—

> No person shall sell, offer for sale, or introduce for sale or deliver for introduction into interstate

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[1] The Secretary of Transportation originally delegated his authority under the Safety Act to the Administrator of the Federal Highway Administration and later to the National Highway Traffic Safety Administration. 49 C.F.R. § 501.2(a).

> commerce regrooved tires . . . unless the tires conform to the requirements set forth below . . .[2]

After setting out specifications for such tires the regulations state that:

> Any person who regrooves tires and leases them to owners or operators of motor vehicles and *any person who regrooves his own tires for use on motor vehicles is considered to be a person delivering for introduction into interstate commerce within the meaning of this part.*[3]

Members of petitioners NAMBO and ATA, interstate motor carriers of passengers or property pursuant to authority granted by the Interstate Commerce Commission, purchase tires specially designed for regrooving and, after a period of use, regroove such tires themselves for their own use. Regulations issued under Section 204(a)(1) of the Interstate Commerce Act, 49 U.S.C. § 304(a)(1), restrict the depth of the tread groove and the use which may be made of regrooved tires by such carriers. See, 49 C.F.R. § 393.75.[4] The regulations of the Federal Highway Administrator under the Safety Act add to the regulatory requirements prescribed under the Interstate Commerce Act for interstate carriers, provisions with respect to undertread, linear inches of tread edges, width of groove after re-

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[2] 49 C.F.R. § 369.7(a), Appendix B, *infra*, at 40a. (49 C.F.R. § 369.7(a) was later reissued, unchanged, at 49 C.F.R. § 569.7(a)).

[3] 49 C.F.R. § 369.7(b) (emphasis added), Appendix B, *infra*, at 41a. (49 C.F.R. § 369.7(b) was later reissued, unchanged, at 49 C.F.R. § 569.7(b)).

[4] The Interstate Commerce Commission exercised safety regulatory authority under the Interstate Commerce Act until the creation of the Department of Transportation when these powers were transferred to the new Department (49 U.S.C. § 1655(e)(6)(C)).

grooving, and others. 49 C.F.R. § 369.7(b) (*See* note 3, *supra*). The effect of these regulations is to require motor carriers, who regroove their own tires, to comply with the Safety Act (as well as the Interstate Commerce Act) on the ground that when the carrier regrooves its own tires it is "delivering" such tires for introduction in interstate commerce.

Petitioner Suburban and other members of petitioner Transit, wholly intrastate carriers of passengers or property, also purchase tires specially designed for regrooving, and, after a period of use, regroove such tires themselves for their own use. The regulations of the Administrator with respect to regrooved tires are not limited in effect to persons in interstate commerce but rather purport to apply to "any person," without regard to whether such person's activities are interstate or intrastate in nature.

On February 28, 1969, petitioner NAMBO filed a complaint in the United States District Court for the District of Columbia seeking a declaratory judgment that the Safety Act regulations were beyond the authority of the Administrator; were vague, uncertain, ambiguous and unenforceable; and were arbitrary, unreasonable and an abuse of discretion.[5] The complaint further sought a temporary and permanent injunction

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[5] Section 105(a)(1) of the Safety Act, 15 U.S.C. § 1394(a)(1) provides for judicial review by a United States Court of Appeals of orders issued by the Administrator under Section 103 of the Act, 15 U.S.C. § 1392. The regulations in suit were not issued under Section 103. Consequently, Section 10b of the Administrative Procedure Act, 5 U.S.C. § 703 (1970), is applicable. *Cf. Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 139-148 (1967); *Independent Broker-Dealers Trade Ass'n* v. *SEC*, 442 F.2d 132, 137-143 (D.C. Cir. 1970), *cert. denied*, 404 U.S. 828 (1971); *Elmo Div. of Drive-X Co.* v. *Dixon*, 348 F.2d 342, 344-345 (D.C. Cir. 1965).

against enforcement of the regulations. Petitioners ATA, Transit and Suburban intervened on the side of the plaintiff. Thereafter, motions for summary judgent were filed by plaintiffs and defendants. The district court, without opinion, denied plaintiffs' motions and granted the motion of defendants. The court's order recites that "the subject regulations relating to the Regrooved Tires are within the statutory authority of defendants . . . [and] are not vague, uncertain nor ambiguous, and are not arbitrary and capricious. . . ."

On petitioners' appeal the Court of Appeals affirmed the district court's determination that the Safety Act is applicable to both interstate and intrastate motor carriers of passengers or property who regroove their own tires. It further upheld the regrooved tires regulations with one important exception. A majority of the Court held that the Administrator is without power to allow a carrier to regroove its own tires and that the regulations are invalid to the extent they permit this practice, Judge Robinson dissenting. In thus reversing the district court *pro tanto*, the majority reasoned that Section 204(a) of the Safety Act authorizes the Administrator to permit only "sale" of regrooved tires. This section, according to the Court, prohibits "delivery for introduction in interstate commerce" which, it added, takes place when a carrier regrooves its own tires. In support of this conclusion it was held that "delivery" refers "not to a transfer of legal possession or control, but to any physical transfer or movement of a regrooved tire for the purpose of introducing it in interstate commerce" and that such a transfer occurs when the carrier moves the tire to a place of use after regrooving (Appendix A, *infra*, at 15a). Dissenting Judge Robinson, while not disagreeing with the

Court's definition of "delivery," held that the "sale-nonsale" distinction of the majority is erroneous and that Congress did not intend "to outlaw arrangements by which the tire industry has made regroovable and regrooved tires available to the motor carrier industry without any visible danger to interstate commerce." (Appendix A, *infra*, at 36a-37a).

The effect of the majority decision is that the Safety Act regulates the use which *consumers* may make of motor vehicle equipment they own and that although a motor carrier may lawfully regroove tires for sale to others, it may not regroove tires for its own use. The majority acknowledges that "[i]f the statute is to this extent defective Congress may amend it, but it is not for us to do." (Appendix A, *infra*, at 19a).

Petitioners' request for rehearing was denied by the majority. The order denying rehearing notes that Judge Robinson would have granted the request. The Court, further, failed to act on petitioners' suggestion for rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

The Safety Act is one of three major federal statutes on highway safety—the others are the Interstate Commerce Act and the Highway Safety Act.[6] The decision below deals with questions of first impression growing out of application of the Safety Act to consumers who are not in the business of selling motor

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[6] The Interstate Commerce Act provides, *inter alia*, for the regulation of interstate motor carriers as to "safety of operation and equipment." 49 U.S.C. § 304(a). The Highway Safety Act provides for the coordination at the federal level of state safety codes as well as research and development and other safety measures, 23 U.S.C. §§ 401 *et seq.*

vehicles and items of motor vehicle equipment, *see Musicians Federation* v. *Wittstein,* 379 U.S. 171, 175 (1964), and to persons whose activities are wholly intrastate in nature. It raises significant and recurring problems in the administration and enforcement of the Act. Indeed, so much confusion and inconsistency have been introduced by the decision with respect to the meaning and application of this important statute, including its relationship to other federal safety acts, and the nature of the commerce which the Act was intended to reach, that it cannot rationally be understood and enforced. These results have been reached in conflict with principles enunciated in decisions of other federal courts, including this Court. Review by this Court is necessary, in the exercise of its supervisory functions, to remove these conflicts and establish guidelines that are important in the administration of the Safety Act. *See, e.g., United States* v. *An Article of Drug . . . Bacto-Unidisk,* 394 U.S. 784, 791, *reh. denied* 395 U.S. 954 (1969); *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board,* 336 U.S. 601, 603 (1949); *Rothensies* v. *Electric Battery Co.,* 329 U.S. 296, 299 (1946).

(1) Despite the fact that the Safety Act has heretofore been thought to be designed to *protect* consumers from their suppliers rather than *regulate* them as consumers, the decision below interprets the Act to govern use of vehicles and items of motor vehicle equipment by carriers who are the ultimate consumers of such vehicles and equipment. The Act was adopted in the midst of rising concern about "the individual in the marketplace . . . incapable of evaluating the comparative safety of competing model cars" and the absence of "consumer or user representation" in the

development of automotive standards.[7] It defines "motor vehicle safety" in terms of the "design, construction or performance" of motor vehicles—not in terms of their use by consumers. 15 U.S.C. § 1391(1). It defines the persons subject to its provisions, *viz.*, manufacturers (including importers), distributors and dealers. 15 U.S.C. §§ 1391(5), (6) and (7). It plainly is intended to regulate persons engaged in the business of supplying the consumer with motor vehicles and motor vehicle equipment as well as the performance of such vehicles and equipment. However, it is not intended to regulate the consumer, in this case the purchaser of buses and trucks and their components, in the use made of vehicles and equipment. Consumer regulation is left to other laws, such as the Interstate Commerce Act. This clearly emerges from the provisions of the Act exempting from prohibited transactions any vehicle or equipment "after the first purchase of it in good faith for purposes other than resale . . . ." 15 U.S.C. § 1397(b)(1). This exemption for the consumer is either incorporated by reference or expressly repeated in the enforcement provisions of the Act. 15 U.S.C. §§ 1398, 1399, 1424(b). For similar reasons the Court in *Chrysler Corporation* v. *Malloy*, 294 F. Supp. 524 (D. Vt. 1968), *reversed on other grounds*, 419 F.2d 499 (1st Cir. 1969), described the Safety Act in these terms:

> The burden of complying with these standards falls squarely on the manufacturer or distributor . . . . Only the performance of a motor vehicle or item of equipment when sold is covered by the Act. The operation of the vehicle by its owner is not so covered. (294 F. Supp. at 528).

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[7] S. Rep. No. 1301, 89th Cong., 2d Sess., 2 U.S. Code Cong. and Adm. News, 1966, pp. 2711-2712.

When the Administrator and the Court below applied the Act to motor carriers who regroove tires, specially designed for the purpose, which were previously purchased by them for their own use, it breached the intended scope of the Act. For the Act does not include regulation of the uses consumers make of vehicles and items of motor vehicle equipment. The decision threatens applicability of the Act generally to uses consumers make of those products, plus collision with other laws under which consumers' use of such products is being regulated.[8]

(2) The Court's bizarre ruling that the Act is intended to prevent motor carriers from regrooving tires for their own use but allows them (or anyone else) to regroove tires for sale to other users, breaches a consistent line of judicial authorities, headed by this Court, that acts of Congress should be construed to avoid absurd results. *See, e.g., Perry* v. *Commerce Loan Company,* 383 U.S. 392, 400 (1966); *United States* v. *American Trucking Associations,* 310 U.S. 534, 543 (1940); *United States* v. *Katz,* 271 U.S. 354, 362 (1926); *Fides, A.G.* v. *Commissioner of Internal Revenue,* 137 F.2d 731 (4th Cir.), *cert. denied,* 320 U.S. 797 (1943). As dissenting Judge Robinson points out, the Court's ruling interdicts longstanding practices of the motor carrier industry that have been demonstrably safe. In addition, such practices have been subject to regulation and, indeed, are now being regulated under the Interstate Commerce Act for interstate carriers. The decision below "ignores the realities of regrooved tire us-

[8] Passenger automobiles and motor carriers not subject to ICC jurisdiction are also subject to state safety laws. Such laws are coordinated at the national level under the Highway Safety Act, 23 U.S.C. §§ 401 *et seq.*

age, and wreaks havoc upon that usage."[9] The majority was cognizant that the absurd results attributed to the statute rendered it "to this extent defective" and invited Congress to adopt corrective measures. The decisions of this Court, however, suggest that judicial correction is the proper course under the circumstances.[10]

(3) The decision of the Court of Appeals threatens conflict with the Interstate Commerce Act even though the two statutes can reasonably be interpreted to avoid conflict. In the enactment of the Safety Act Congress was careful to avoid conflicts in jurisdiction. It provided in Section 205, 15 U.S.C. § 1425, that in event of conflicts between requirements of the Federal Trade Commission and requirements under the Safety Act, the latter shall prevail. It further provided in Section 103(g), 15 U.S.C. § 1392(g), that the Interstate Commerce Commission (whose safety powers had not then been transferred to the Department of Trans-

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[9] Appendix A, *infra*, at 35a (Robinson J., dissenting).

[10] A mere reading of Section 204(a) of the Act, without regard [benefit of knowledge as] to the purposes of the Act, demonstrates that it is a sales statute, *i.e.*, the restrictions on regrooved tires are keyed to transactions leading to or resulting in a sale. Thus the Administrator is empowered to "permit the *sale* of regrooved tires." (Emphasis added). In addition, the prohibitions on transactions in regrooved tires in the language leading up to the exception relate to sales type transactions. Even the language "deliver for introduction in interstate commerce" is part of a clause set off by commas which reads "introduce for sale or deliver for introduction in interstate commerce." Clearly the meaning of "deliver" must be determined in the context of "sale." This would not include the situation where the subject is intended for consumption by the producer (*cf. Hipolite Egg Co.* v. *United States*, 220 U.S. 45, 54 (1911)—the situation when a carrier regrooves its own tires for its own use.

portation) could issue safety regulations calling for a higher standard of performance "*subsequent* to . . . manufacture than that required to comply with the applicable Federal standard at the time of manufacture." [11] Congress did not provide for conflicts between regulations under the Interstate Commerce Act and the Safety Act at the stage of use by consumers because it did not foresee that the Safety Act would be applied at that stage. The decision below, however, makes both applicable to the same activity and, hence, lays the basis for conflict.

The Safety Act provides for penalties as great as $400,000. 15 U.S.C. § 1398. The Interstate Commerce Act, on the other hand, imposes penalties of "not less than $100 nor more than $500 for the first offense and not less than $200 nor more than $500 for any subsequent offense." 49 U.S.C. § 322(a). Thus, different penalties are applied under the two statutes, emphasizing their different purposes, and carriers face the prospect of penalties for conduct which at one and the same time complies with one statute and violates the other.

It is no answer to say that conflict is unlikely because both statutes are now administered by the Department of Transportation. In point of fact they are administered by separate divisions within the Department, with the safety provisions of the Interstate Commerce Act coming under the jurisdiction of the Bureau of Motor Carrier Safety and the Safety Act being administered by the National Highway Traffic

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[11] (Emphasis added). This provision is further evidence that the Safety Act was intended to govern manufacture, not uses by consumers subsequent to manufacture.

Safety Administration.[12] Even more important, however, this Court observes the cardinal principle of construction that when "there are two acts upon the same subject, the rule is to give effect to both if possible." *United States* v. *Zacks,* 375 U.S. 59, 67-68 (1963); *United States* v. *Borden Co.,* 308 U.S. 188 (1939). When the Court below unnecessarily construed the Interstate Commerce Act and Safety Act to overlap, despite potential conflict, it departed from this principle of construction. The statutory ambiguities [13] in this case are capable of resolution by interpreting the Safety Act to apply at the manufacturing and distribution stage and the Interstate Commerce Act to apply subsequently when there is consumer usage. Review by this Court, in exercise of its supervisory responsibilities, is necessary to correct erroneous departure from established principles of statutory construction.

(4) The decision of the Court of Appeals further expands the scope of the Safety Act beyond its plain meaning by finding it applicable to activities of intrastate carriers. All three members of the court below accepted the uncontroverted fact that Suburban operates exclusively in intrastate transportation (Appendix A, *infra,* at 3a, 20a-21a). Nevertheless, for differing reasons, all three agreed that Suburban and other

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[12] The Secretary of Transportation has delegated his authority to administer Section 204 of the Interstate Commerce Act (49 U.S.C. § 304) to the Federal Highway Administrator. 49 C.F.R. § 1.48(f). The Federal Highway Administrator has, in turn, delegated this authority to the Director of the Bureau of Motor Carrier Safety. 49 C.F.R. § 389.4. As to the National Highway Traffic Safety Administration, *see* note 1, *supra.*

[13] With due deference, the ambiguities are not really "statutory," but have been imported into the law by the Administrator and the Court of Appeals.

intrastate carriers were not beyond the intended reach of Section 204 and the Administrator's regulations promulgated thereunder. Judge Robinson, with whom Judge McCree concurred, concluded that because of the "potential impact upon interstate traffic" (Appendix A, *infra,* at 32a), intrastate motor vehicle operations are covered by the Safety Act and therefore are within the Administrator's regulatory reach. (Appendix A, *infra,* at 32a-33a). Judge Robb, on the other hand, recognized that "[o]n its face the statute does not relate to activities which merely affect interstate commerce, and I think it cannot be so broadly construed." (Appendix A, *infra,* at 17a.) However, Judge Robb went on to entertain a "presumption," which not even the administrator had urged upon the Court, that "although a bus tire may never in fact have crossed a state line it would nevertheless be subject to the proscription of the Act because the Administrator has rationally presumed, as a matter of law, that the tire will travel interstate at some futuer date." (Appendix A, *infra,* at 18a).

The court below was thus divided in its approach to this issue, and the reasoning of neither faction comports with the intent of the Safety Act and with the status of the record. The "presumption" adopted by Judge Robb was not only unsupported by the record, as Judge Robinson noted (Appendix A, *infra,* at 23a, n.21), but in fact is contradicted by the uncontroverted fact that Suburban regrooves tires for its own use in wholly intrastate operations (Appendix A, *infra,* at 3a). Moreover, as Judge Robinson also recognized (Appendix A, *infra,* at 23a, n.21), such a presumption, by abandoning any requirement of proof of interstate activities, would obliterate the distinction between in-

terstate and intrastate commerce which is drawn in Section 204(a) itself.

The construction of the Safety Act advanced in Judge Robinson's opinion departs from congressional intent in a different but equally erroneous fashion. The short answer to the contention that the Act was intended to reach activities which merely affect interstate commerce was supplied by Judge Robb: "Had Congress intended to include such activities in its definition it would have said so." (Appendix A, *infra,* at 17a-18a). The flaw in Judge Robinson's expansive reading of the Act is apparent from the fact that when Congress has intended a statute to cover interstate commerce *and* activities affecting interstate commerce, it has indeed said so. See, *e.g.,* National Labor Relations Act, 29 U.S.C. § 152; Labor-Management Relations Act, 29 U.S.C. § 158; Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a(b) and 2000e(f)-(g), respectively; Gun Control Act of 1968, 18 U.S.C. App. 1202; Federal Aviation Act, 49 U.S.C. § 1301(29). *See, Texas International Airlines* v. *CAB,* 473 F.2d 1150 (D.C. Cir. 1972).

The issue here is not the extent of Congress' power to regulate commerce, but rather the extent to which Congress has chosen to exercise that power. It is apparent from Section 102(9) of the Safety Act, 15 U.S.C. § 1391(q), that Congress intended to regulate only commerce "between any place in a State and any place in another State, or between places in the same State through another State," and not commerce which is wholly within one State. It is equally apparent that the interstate commerce necessary to invoke the Administrator's jurisdiction may not properly be supplied through a presumption which is without evidentiary or

logical support. Therefore, petitioners submit that the reasoning of both factions of the Court of Appeals was erroneous and that review by this Court is necessary to redress this distortion of the jurisdiction which Congress intended to grant the Administrator in enacting the Safety Act, especially since at stake is the delicate balance between state and federal regulatory authority. *Cf. Schechter Corporation* v. *United States,* 295 U.S. 495 (1935), *New York ex rel Pennsylvania Railroad* v. *Knight,* 192 U.S. 21, 27 (1904).

(5) As previously noted, the decision below (i) applies the statute to consumers and uses of products contrary to the apparent intent of Congress; (ii) renders the statute irrational by holding that it prevents motor carriers from regrooving tires for their own use while they may regroove tires for sale to other users; (iii) leaves unresolved the relationship between the Safety Act and the Interstate Commerce Act; and (iv) expands the coverage of the statute beyond the interstate commerce which Congress intended to reach. But that is not all:

(a) The decision concludes that "the obvious purpose of Congress in enacting Section 204 . . was to prohibit the use of regrooved tires in interstate commerce, whether that use was by the first purchaser or by anyone else." (Appendix A, *infra,* at 16a). On the contrary, Congress imposed no restrictions on the "use" of regrooved tires. It simply prohibited certain transactions in such tires and expressly authorized the Administrator to allow the "sale" of regrooved tires "which he finds are designed and constructed in a manner consistent with the purposes of this Act." 15 U.S.C. § 1424(a). It is inconceivable that Congress would per-

mit the sale of regrooved tires and, simultaneously, forbid their use.

(b) The decision interprets the language of Section 204(a) of the Act, 15 U.S.C. § 1424(a), that "no person shall . . . deliver for introduction in interstate commerce, any tire . . . which has been regrooved . . ." to apply to any movement for the purpose of "*introducing* [the tire] in interstate commerce." (Appendix A, *infra,* at 15a).[14] Judge Robb later observed, in direct contradiction of this holding, that "[t]he proscription against regrooved tires contained in section 204(a) is not against their *mere 'introduction'* in interstate commerce." (Appendix A, *infra,* at 18a, n.7).[15] In addition, the decision fails to give the word "delivery" its ordinary meaning of a transfer of possession from one person to another. *See, e.g., Davies, Turner & Co.* v. *United States,* 256 F. Supp. 379 (Cust. Ct. 1966) (defining delivery). *Compare Banks* v. *Chicago Grain Trimmers Ass'n,* 390 U.S. 459, 465, *reh. denied,* 391 U.S. 929 (1968) *and Addison* v. *Holly Hill Fruit Products, Inc.,* 322 U.S. 607, 618 (1944) (on statutory construction). This is the contradictory manner in which the Court disregarded established canons of statutory construction to arrive at the erroneous result that a motor carrier which regrooved tires for its own use has effected a delivery for introduction in interstate commerce in violation of Section 204(a) of the Act. Serious confusion in the meaning and application of the statute is the result.

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[14] Emphasis added.

[15] Emphasis added.

CONCLUSION

This petition for a writ of certiorari should be granted because of the importance of the questions raised to the carriers and the public alike.

Respectfully submitted,

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APPENDIX

CONCLUSION

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APPENDIX

APPENDIX A

Opinion of the United States Court of Appeals for the District of Columbia Circuit

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1268

NATIONAL ASSOCIATION OF MOTOR BUS OWNERS, ET AL, APPELLANTS

v.

CLAUDE S. BRINEGAR, SECRETARY OF THE DEPARTMENT OF TRANSPORTATION

Appeal from the United States District Court for the District of Columbia

Decided July 26, 1973

Robert J. Corber for appellant National Association of Motor Bus Owners, et al.

Francis A. Silver for appellant, American Transit Association, Milwaukee & Suburban Transport Corporation, and the City Transit Company.

Peter T. Beardsley and *Richard A. Mehley* were on the brief, for appellant, American Trucking Associations, Inc.

Joseph B. Scott, Attorney, Department of Justice for appellee. *L. Patrick Gray, III*, Assistant Attorney General at the time the brief was filed, *Thomas A. Flannery*, U. S. Attorney at the time the brief was filed, *Alan S. Rosenthal* and *Judith S. Ziss*, Attorneys, Department of Justice, were on the brief for appellee.

Before: WADE H. MCCREE, JR.,* *Circuit Judge for the Sixth Circuit*, ROBINSON and ROBB, *Circuit Judges*.

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* Sitting by designation pursuant to Title 28, U.S.C. § 291(a) (1970).

Opinion for the Court filed by *Circuit Judge* ROBB. *Circuit Judge* MCCREE concurs in the result and in Parts I, II, III, and V, but not in Part IV. *Circuit Judge* ROBINSON concurs in Parts I, II, and III, but not in Part IV or V.

Opinion filed by *Circuit Judge* ROBINSON, with whom *Circuit Judge* MCCREE joins in Parts I-III, p. 19, concurring in part and dissenting in part.

ROBB, *Circuit Judge*: In this action for declaratory judgment and injunctive relief the appellants challenge regulations promulgated by the Secretary of Transportation and the Acting Administrator of the Federal Highway Administration. The regulations, issued under section 204 of the Traffic and Motor Vehicle Safety Act of 1966[1] (80 Stat. 729, 15 U.S.C. § 1424 (1970)) govern the sale and use of regrooved tires.[2] The complaint alleges that the regulations are (a) beyond the authority of the Administrator, (b) vague, uncertain and ambiguous, and (c) arbitrary, unreasonable and an abuse of discretion. On cross motions for summary judgment the District Court rejected these contentions and entered a judgment for the defendants.

Appellant National Association of Motor Bus Owners (NAMBO) is the national trade organization for the intercity bus industry. Its members engage in the transportation of persons and property in interstate commerce by motor vehicles pursuant to authority issued by the Interstate Commerce Commission under the Interstate Commerce Act.

Appellant American Trucking Associations, Inc. (ATA), an intervenor in the District Court, is the national organi-

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[1] References in this opinion to particular provisions of the Traffic and Motor Vehicle Safety Act are made according to those found in the original Act, cited in Pub. L. 89-563, Title II, § 204, Sept. 9, 1966, 80 Stat. 718.

[2] Section 204(c) of the Act (15 U.S.C. § 1424(c) (1970)), defines a regrooved tire as "a tire on which a new tread has been produced by cutting into the tread of a worn tire."

zation of the trucking industry. It is an affiliation of fifty-one state trucking associations whose members consist of for-hire and private motor carriers. Most of the for-hire carriers operate pursuant to authority issued by the Interstate Commerce Commission.

The appellants American Transit Association (Transit), Milwaukee & Suburban Transport Corp. (Suburban), and City Transit Company (City Transit), also intervened in the District Court. Transit is a national voluntary trade association for the local transit industry.

City Transit operates motor buses exclusively in the intrastate transportation of passengers within and around the city of Dayton, Ohio, and in charter operations wholly within the state of Ohio and by local authorities in Ohio. City Transit purchases tire mileage from the B. F. Goodrich Company pursuant to a contract under which an employee of Goodrich, working in City Transit's garages, regrooves tires used by City Transit.

Suburban operates motor buses exclusively in the intrastate transportation of passengers for compensation in Milwaukee, Wisconsin, and adjacent areas. It conducts its business under a Common Motor Carrier Certificate issued by the Public Service Commission of Wisconsin. The company regrooves its own bus tires for use on its own buses operating wholly in intrastate commerce within the state of Wisconsin.

I.

In order that the challenged regulations and the contentions of the parties may be viewed in focus a summary of the relevant parts of the statute and their legislative history is necessary.

On October 19, 1965, a tire safety bill was introduced in the Senate (S. 2669, 89th Cong., 2d Sess.). When reported

out of committee as the "Tire Safety Act of 1966" this bill provided, with respect to regrooved tires:

> No person, firm, or corporation shall sell, offer for sale, or introduce for sale or deliver for introduction in interstate commerce any tire or motor vehicle equipped with any tire which has been regrooved, except that the Secretary may by order permit the sale of regrooved tires or motor vehicles equipped with such tires which he finds are designed and constructed in a manner consistent with the purposes of this Act. S.Rep. No. 1089, 89th Cong., 2d Sess. 45 (1966).

The bill also, among other things, required the Secretary[3] to promulgate minimum safety performance standards, maximum permissible load standards, and labeling requirements for tires, and to investigate the feasibility of grading requirements. (S.Rep. No. 1089, 89th Cong., 2d Sess. 33-36, 40 (1966)). In the bill, "motor vehicle" was defined to mean "passenger cars and station wagons" other than certain special purpose vehicles such as racing cars. (*Id.* at 33). According to the Senate Commerce Committee, the regrooved tire provision was inserted into the bill because:

> [T]he committee concluded that the practice of regrooving passenger car tires, in which an iron or tread design device is used to cut into the undertread

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[3] The bill, as introduced and later enacted, vested the administrative functions in the Secretary of Commerce. These duties were thereafter transferred to the Secretary of Transportation (49 U.S.C. 1655(a)(6)(A)) who, in turn, delegated his authority to the Federal Highway Administrator, 49 C.F.R. § 1.4(c)(3)(1) (1970), and later, to the Director of the National Highway Safety Bureau, 49 C.F.R. § 151 (1971). The authority now rests in the National Highway Traffic Safety Administrator pursuant to 49 C.F.R. § 1.51 (a) (1972).

> of a smooth tire carcass to produce a new tread design—a universally condemned practice——should be prohibited by this bill. However, the Secretary would be given the authority to permit the regrooving of any tires which he finds are designed and constructed so as to permit safe regrooving. S.Rep. No. 1089, 89th Cong., 2d Sess. 5 (1966).

The tire safety bill was enacted by the Senate with the regrooved tire provision unchanged (112 Cong. Rec. 6925 (1966)). But neither this bill nor a tire safety bill introduced in the House of Representatives which contained a similar prohibition (H.R. 1366, 89th Cong., 2d Sess. (1966)) ever reached the House floor.

During the same session a traffic safety bill, a more comprehensive measure than the tire safety bills, was also before each House. The Senate version (S. 3005) authorized the promulgation of "motor vehicle safety standards" for "motor vehicles and motor vehicle equipment". (S.Rep. No. 1301, 89th Cong., 2d Sess. 25 (1966)). The bill, which made no separate provision for tires, defined "motor vehicle" to mean:

> [A]ny vehicle driven or drawn by mechanical power primarily for use on the public roads, streets, and highways, other than (1) a vehicle subject to safety regulations under part II of the Interstate Commerce Act, as amended (49 U.S.C. 301 *et seq.*), or under the Transportation of Explosives Act as amended (18 U.S.C. 831-835), and (2) a vehicle or car operated exclusively on a rail or rails. S.Rep. No. 1301, 89th Cong., 2d Sess. 24 (1966).

The bill was passed by the Senate without substantial change. (112 Cong. Rec. 14256 (1966)).

The traffic safety bill on the House side (H.R. 13228) differed in certain respects from the Senate provision.

First, it contained a separate title on tire safety, designated as Title II. This title provided that standards promulgated in Title I (which, as in the Senate bill, dealt generally with vehicle and equipment safety standards) require that tires be properly labeled and, further, that all new cars be equipped with tires which are adequate when the vehicle is fully loaded. The Secretary was also directed to establish a tire grading system (H. Rep. No. 1776, 89th Cong., 2d Sess. 9 (1966)). The tire safety title did not deal specifically with regrooved tires.

The House Committee on Interstate and Foreign Commerce explained the need for a separate title pertaining to tires:

> In a number of bills which have been introduced in both Houses as well as in a bill which has passed the Senate (S. 2669) the necessity for standards for tires was considered as an independent problem and without reference to its relationship to the total traffic safety problem. S. 2669 is confined only to the improvement of tires for passenger cars and station wagons. The committee decided that although tires are a highly important part of the total traffic safety problem they are, nevertheless, an integral part of it and should be dealt with in the context of the total problem and not in a piecemeal fashion. Therefore it is neither necessary nor desirable to grant separate authority for the establishment of standards for this one item of motor vehicle equipment when the Secretary has full authority to issue standards as to tires (as well as any other item of motor vehicle equipment) under title I of the reported bill. However, the committee did feel that it was necessary to emphasize this aspect of the safety problem and to establish certain specific requirements which should be contained in the Secretary's standards on tires. These requirements are set forth in section 201, and deal

> only with information to be given to consumers. The Secretary's authority to establish standards as to tire performance is contained in title I, and in establishing these standards he will have to consider distinctions between new tires and retreads. H.Rep. No. 1776, 89th Cong., 2d Sess. 32 (1966).

The House bill also contained a broader definition of "motor vehicle" than the Senate bill. Specifically, section 102(3) defined "motor vehicle" as:

> . . . any vehicle driven or drawn by mechanical power manufactured primarily for use on the public streets, roads, and highways, except any vehicle operated exclusively on a rail or rails. H.Rep. No. 1776, 89th Cong., 2d Sess. 32 (1966).

According to the Committee, the exemption was removed for vehicles subject to part II of the Interstate Commerce Act or the Transportation of Explosives Act because "[t]here appeared to be no way to determine with any certainty which vehicles would be subject to the standards and which would be exempt". (H.Rep. No. 1776, 89th Cong., 2d Sess. 15 (1966)). However, to avoid conflicting regulations the Committee inserted as section 103 (g) of Title I:

> . . . a requirement that in prescribing safety regulations the Interstate Commerce Commission will not adopt or continue in effect any regulation on safety which is different from a safety standard issued under this title. The Interstate Commerce Commission, however, after manufacture, can impose a higher standard of safety performance on a motor vehicle subject to this jurisdiction. H.Rep. No. 1776, 89th Cong., 2d Sess. 16 (1966).

This bill was passed by the House with these provisions substantially intact. (112 Cong. Rec. 19673 (1966)).

The Senate then requested a conference. (112 Cong. Rec. 19863 (1966)). Senator Magnuson, Chairman of the Senate Commerce Committee, explained on the floor why a conference was required:

> In clarifying the scope of truck standards, in spelling out detailed requirements for tire safety standards * * *, the House Amendments represent constructive effort greatly in the public interest.
>
> There are, however, several desirable features in the Senate bill which are not fully reflected in the House version. * * * [E.g.], [t]he desirability of prohibiting tire regrooving. . . .[4] 112 Cong. Rec. 19862-63 (1966).

In conference Title II of the House bill, the tire title, was expanded to include, among other things, a regrooved tire prohibition almost identical with the one contained in the original Senate tire bill (H.Rep. No. 1919, 89th Cong., 2d Sess. 12, 13 (1966)). The broad definition of "motor vehicle", contained in Title I of the House bill, was retained. (*Id.* at 2). Senator Magnuson, in submitting the conference report to the Senate, said:

> The House Members accepted * * * the prohibition—taken from the Senate tire bill—against the regrooving of tires. 112 Cong. Rec. 21487 (1966).

Reporting to the House, Mr. Staggers stated:

> The House definition [of motor vehicle] covers all vehicles, including trucks and buses. The definition in the Senate version was more restrictive and was interpreted as not including trucks and buses. The man-

[4] Here, Senator Magnuson apparently was referring to the Senate tire bill rather than to the comprehensive traffic safety bill being debated.

agers for the Senate receded. 112 Cong. Rec. 21349 (1966).

The bill, as amended in conference, was enacted by both houses as the Traffic and Motor Vehicle Safety Act of 1966. (112 Cong. Rec. 21353, 21492; Pub.L. 89-563, Sept. 9, 1966, 80 Stat. 718-730).

II.

Title I of the Act is captioned "Motor Vehicle Safety Standards". A motor vehicle safety standard is defined by section 102(2) as "a minimum standard for motor vehicle performance, or motor vehicle equipment performance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria." (15 U.S.C. § 1391(2)). Section 102(4) (15 U.S.C. § 1391(4)) provides that " 'Motor vehicle equipment' means any system, part, or component of a motor vehicle as originally manufactured or any similar part or component manufactured or sold for replacement or improvement of such system, part, or component or as any accessory, or addition to the motor vehicle. . . ."

Section 103(a) (15 U.S.C. § 1392(a)) directs the Secretary to "establish by order" standards as defined in section 102(2). Section 103(b) (15 U.S.C. § 1392(b)) specifies that the "Administrative Procedure Act shall apply to all orders establishing, amending, or revoking a Federal motor vehicle safety standard *under this title.*" (Emphasis added). Section 103(f) directs that in prescribing standards the Secretary shall consider relevant available motor vehicle safety data, consult with the Vehicle Equipment Safety Commission and other agencies and "consider whether any such proposed standard is reasonable, practicable and appropriate for the particular type of motor vehicle or item of motor vehicle equipment for which it is prescribed; and . . . consider the extent to which such

standards will contribute to carrying out the purposes of this Act." (15 U.S.C. § 1392(f)).

Section 108(2) (15 U.S.C. § 1397(a)) provides that "No person shall—(1) manufacture for sale, sell, offer for sale, or introduce or deliver for introduction in interstate commerce, or import into the United States, any motor vehicle or item of motor vehicle equipment manufactured on or after the date any applicable Federal motor vehicle safety standard takes effect *under this title* unless it is in conformity with such standard except as provided in subsection (b) of this section. . . ." (Emphasis added). Section 108(b)(1) stipulates that the prohibition of section 108(a)(1) "shall not apply to the sale, the offer for sale, or the introduction or delivery for introduction in interstate commerce of any motor vehicle or motor vehicle equipment after the first purchase of it in good faith for purposes other than resale. . . ." (15 U.S.C. § 1397(b)(1)).

Section 109(a) (15 U.S.C. § 1398(a)) authorizes the imposition of a civil penalty not exceeding $1,000 for each violation of any provision of section 108 or any regulation issued thereunder, except that the maximum penalty for any related series of violations shall not exceed $400,000.

Section 110(a) confers jurisdiction on United States District Courts "to restrain violations of this title, or to restrain the sale, offer for sale, or the introduction or delivery for introduction, in interstate commerce, or the importation into the United States, of any motor vehicle or item of motor vehicle equipment which is determined, prior to the first purchase of such vehicle in good faith for purposes other than resale, not to conform to applicable Federal motor vehicle safety standards prescribed *pursuant to this title* . . . ." (15 U.S.C. § 1399(a)) (Emphasis added). Section 119 (15 U.S.C. § 1407) authorizes the Secretary "to issue, amend, and revoke such rules and

regulations as he deems necessary *to carry out this title.*" (Emphasis added).

Title II of the Act is captioned "Tire Safety". Section 201 (15 U.S.C. § 1421) of this Title directs that "In all standards for pneumatic tires established *under title I of this Act*, the Secretary shall require that tires subject thereto" be labeled with certain specified safety information. (Emphasis added). Section 202 provides: "In standards established *under title I of this Act* the Secretary shall require that each motor vehicle be equipped by the manufacturer or by the purchaser thereof at the time of the first purchase thereof in good faith for purposes other than resale with tires which meet the maximum permissible load standards when such vehicle is fully loaded with the maximum number of passengers it is designed to carry and a reasonable amount of luggage." (15 U.S.C. § 1422) (Emphasis added). Section 203 directs the Secretary "through standards established *under title I of this Act*" to prescribe by order and publish in the Federal Register a uniform quality grading system for motor vehicle tires. (15 U.S.C. § 1423) (Emphasis added).

Section 204(a) and (b) (15 U.S.C. § 1424(a) and (b)) provide:

> (a) No person shall sell, offer for sale, or introduce for sale or deliver for introduction in interstate commerce, any tire or motor vehicle equipped with any tire which has been regrooved, except that the Secretary may by order permit the sale of regrooved tires and motor vehicles equipped with regrooved tires which he finds are designed and constructed in a manner consistent with the purposes of this Act.
>
> (b) Violations of this section shall be subject to civil penalties and injunction in accordance with sections 109 and 110 of this Act.

Section 206 (15 U.S.C. § 1426, 84 Stat. 263) directs the Secretary to establish "safety standards *under title I*" for tire carcasses which can be retreaded. (Emphasis added).

Purporting to act pursuant to the authority of sections 203(a) and 119[5] of the Act (15 U.S.C. §§ 1424(a), 1407) the Administrator published a Notice of Proposed Rulemaking to establish "criteria to govern the use of regrooved tires." (33 Fed. Reg. 8603 (1968)). Interested persons were invited to participate in the making of the proposed regulations by submitting data, views or arguments.[6] Thereafter the regulations were published (34 Fed. Reg. 1149, 1150 (1969)) and became effective April 1, 1969. (34 Fed. Reg. 3687, 3688 (1969)). They now appear at 49 C.F.R. § 569.1, *et seq.* (1972).

The regulations challenged by appellants are:

> (a) Regrooved Tires: No person shall sell, offer for sale, or introduce for sale or deliver for introduction into interstate commerce regrooved tires produced by removing rubber from the surface of a worn tire tread to generate a new tread pattern unless the tires conform to [certain specified requirements].
>
> • • • •
>
> (b) Any person who regrooves tires and leases them to owners or operators of motor vehicles and any person who regrooves his own tires for use on motor vehicles is considered to be a person delivering for introduction into interstate commerce within the meaning of this part. 49 C.F.R. § 569.7.

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[5] The Administrator's rulemaking must stand on the authority granted in section 204(a) since section 119, the "necessary rules and regulations" clause, is by its very terms not applicable to the tire safety title of the Act.

[6] The appellants were among those submitting comments and arguments.

III.

The appellants, in their brief, attack the regulations on several grounds. (1) They say that the Act contemplates the issuance of Motor Vehicle Safety Standards, taking into account the factors and considerations specified in section 103 of Title I, and that accordingly, the Secretary should have promulgated such standards for regrooved tires, instead of issuing a regulation under section 204 in Title II. Noting that the Secretary may proceed under section 204 "by order" they argue that the "only provision in the Act for orders is section 103 [of Title I] which authorizes the Administrator to issue Federal standards 'by order' ". (2) Contending that the Act applies only to manufacturers, distributors and dealers and not to consumers such as themselves, they invoke the "first purchase" exemptions appearing or implicit in sections 108(b), 109 and 110. (3) They argue that section 204 does not apply to carriers subject to regulation under the Interstate Commerce Act. (4) They say that motor carriers who regroove their own tires and use them on their own vehicles do not "deliver" them for introduction in interstate commerce. (5) Finally, Suburban and City Transit contend that since they operate wholly in intrastate commerce they are not subject to regulation under the Act. We are not persuaded by any of these arguments.

We think the authority of the Secretary under section 204(a) of Title II is independent of his authority to establish safety standards under section 103 of Title I. Section 103 by its terms applies only to orders establishing standards under Title I. Section 204(a) does not in terms refer to Title I, but the other operative sections of Title II are specifically keyed to "standards established under title I." (Sections 201, 202, 203, 206; 15 U.S.C. §§ 1421, 1422, 1423, 1426). Standards under section 103 must be "practicable * * * meet the need for motor vehicle safety, * * * and stated in objective terms." On the other

hand section 204(a) sets up its own standards for regrooved tires: their sale may be permitted only if they are "designed and constructed in a manner consistent with the purposes of this Act." Those purposes are "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." (Section 1; 15 U.S.C. § 1381). Thus, even though the requirements of section 204(a) are not "practicable"—that is, even though it is not "practicable" to produce a regrooved tire that meets those requirements—the use of regrooved tires is still prohibited.

The appellants argue that they are immune from regulation under section 204 because they are subject to safety regulations promulgated under the Interstate Commerce Act. (49 U.S.C. § 301 *et seq.*). In support of their argument the appellants point to section 205 of the Safety Act which provides that in the event of conflict between the requirements of orders or regulations issued by the Administrator, applicable to tires, and orders issued by the Federal Trade Commission, the provisions of orders or regulations by the Administrator shall prevail. The appellants contend that since no provision was made for conflicts between the Administrator and the Interstate Commerce Commission, we must conclude that Congress did not intend section 204 to apply to carriers subject to regulation under the Interstate Commerce Act. Congress thought no conflict could arise, say the appellants, because it was not intended that section 204 should apply to carriers subject to regulation under the Interstate Commerce Act. We cannot accept the inference drawn by the appellants. Section 204 applies to "any tire or motor vehicle equipped with any tire which has been regrooved. . . ." As we have seen, the conference version of the bill, which was finally enacted, expanded the definition of motor vehicle to include "all vehicles, including trucks and buses". Moreover, since bus and truck operators are major users of

regrooved tires it would be unreasonable to conclude that Congress intended to exempt them from the prohibition of section 204. We note also that the appellants do not claim that any conflicts in the regulations now exist; and we think the likelihood of conflicts is remote since both the Motor Vehicle Safety Act and section 204 of the Interstate Commerce Act (49 U.S.C. § 304) are now administered by the Department of Transportation. *See* 49 U.S.C. § 1655 (e)(6)(C).

The appellants contend that by regrooving their own tires and using them on their own vehicles they do not "deliver" the tires for introduction within the meaning of section 204. They invoke the dictionary definition of "deliver" as meaning to give, transfer; yield possession or control of; make or hand over; send to an intended destination. From this they argue that a person cannot make a delivery to himself and that "delivery for introduction" must mean delivery by a manufacturer, wholesaler, or dealer to a wholesaler, dealer, or user pursuant to a sale. If the appellants' argument is correct, then the word "deliver" in section 204 is unnecessary, for such transactions by a manufacturer, wholesaler or dealer would be covered by the word "sale". We hold, however, that the word "deliver" in the context of the statute cannot be so narrowly and legalistically construed, and that, in using the word, Congress was referring not to a transfer of legal possession or control, but to any physical transfer or movement of a regrooved tire for the purpose of introducing it in interstate commerce. A person who regrooves his own tires and thereafter moves them to his garage or terminal for use on motor vehicles is therefore within the intendment of the statute, and subject to regulation thereunder.

The "first purchase" exception upon which the appellants rely appears in two sections of Title I. Section 108

(b)(1) exempts from the prohibitions of section 108(a)(1) a purchaser in good faith for purposes other than resale. A similar provision in section 110(a) exempts a first purchaser from the injunctive jurisdiction of the district courts. The appellants argue that since they buy their tires "for purposes other than resale" they are exempted from the coverage of the Act. We do not agree.

Both section 108(b)(1) and section 110(a), which appear in Title I of the Act, refer and are keyed to violations or other sections of that title. They do not relate to violations of Title II, in which section 204 appears, and we find nothing to indicate that Congress intended the first purchase exception to be carried over to section 204. We are fortified in this conclusion by the obvious purpose of Congress in enacting section 204, which was to prohibit the use of regrooved tires in interstate commerce, whether that use was by the first purchaser or by anyone else.

Appellants advance the theory that the "first purchase" exception is applicable to regrooved tires because section 204(b) provides that "violations of this section shall be subject to civil penalties and injunction in accordance with sections 109 and 110 of this Act." Section 109 stipulates the civil penalties that may be levied for violations of section 108, which contain the "first purchase" exception. Section 110 is a dual grant of jurisdiction to the district courts (1) to restrain violations of Title I, or (2) to restrain "the sale, offer for sale, or introduction or delivery for introduction" of motor vehicles or motor vehicle equipment prior to first purchase and not conforming "to applicable Federal motor vehicle standards prescribed pursuant to this title. . . ." This second grant, containing the first purchase exception, is predicated upon the applicable motor vehicle standards issued under section 103 and is not keyed to section 204. However, the first grant, permitting injunctive relief against statutory violations, is readily

transferable to section 204 and conveys equitable jurisdiction over violations of section 204(a). We think that the reference in section 204(b) to sections 109 and 110 is merely an indication of the procedure and penalties available for the enforcement of section 204(a); it is not a limitation on the sweep of section 204(a).

IV

The contentions of Suburban and City Transit present more difficulty. By affidavits filed in the District Court and not traversed by the Administrator on the motion for summary judgment, they assert that they operate motor buses exclusively in the intrastate transportation of passengers. They contend that since their operations are not in interstate commerce they do not come within the scope of the Act. The Administrator responds that the roads upon which the buses of the two companies travel "are within the stream of interstate commerce", that the buses "intermingle with interstate traffic" and that a defective tire on such a bus could interfere with traffic in interstate commerce. Accordingly, says the Administrator, he "was plainly justified in determining that a person who places a tire on a bus which will travel on such a road has placed it in 'interstate commerce' ".

In substance the Administrator's argument is that his regulation is justified because a defective tire on a bus operating in intrastate commerce may affect interstate commerce. The flaw that I find in the Administrator's argument is that the statute (Section 101(9); 15 U.S.C. § 1391(9)) defines "interstate commerce" as "commerce between any place in a State and any place in another State, or between places in the same State through another State." On its face the statute does not relate to activities which merely affect interstate commerce, and I think it cannot be so broadly construed. Had Congress intended to include such activities in its definition it would have said

so. *Cf. Texas International Airlines* v. *CAB*, 473 F.2d 1150 (D.C. Cir. 1972).[7]

Although I am not impressed by the Administrator's response to the argument of the intrastate bus companies I think his regulation may be sustained on another ground. Interstate commerce "is an intensely practical concept drawn from the normal and accepted course of business". *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 231 (1947). As a practical matter I think it not an irrational conclusion that any bus, even though presently engaged in intrastate transportation, is likely at some time to cross state lines. A bus may be driven across state lines without authority of its owner, or it may be chartered, leased or sold for use in transporting persons across state lines. In short, it is not unreasonable to conclude that a bus and its tires may travel beyond the bounds of its usual habitat. Thus, although a bus tire may never in fact have crossed a state line it would nevertheless be subject to the proscription of the Act because the Administrator has rationally presumed, as a matter of law, that the tire will travel interstate at some future date. If this were not so, and the prohibition of section 204 were unenforceable against the owner of any buses normally operated in intrastate commerce, the statute would be substantially ineffectual.

V.

Having rejected the appellants' many challenges to the regulations we turn finally to one specific flaw which we believe invalidates them in part. Section 204 allows the Administrator to permit only the sale of regrooved tires.

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[7] The proscription against regrooved tires contained in section 204(a) is not against their mere "introduction" in interstate commerce. The language that Congress used prohibited (in interstate commerce) the sale, offer for sale, introduction for sale, and the delivery for introduction of regrooved tires.

This is the position of the appellants in their brief, and was conceded by the government at oral argument. Yet, the Administrator's regulation purports to authorize not only the sale of regrooved tires but also their delivery for introduction into interstate commerce. We are constrained to conclude that in permitting more than the sale of regrooved tires the Administrator's regulation exceeds his authority, and the District Court should have held it to be invalid. If the statute is to this extent defective Congress may amend it, but it is not for us to do so. "It is not for us * * * to try to avoid the conclusion that Congress did not mean what it said. Arguments of policy are relevant when for example a statute has an hiatus that must be filled or there are ambiguities in the legislative language that must be resolved. But when Congress, though perhaps mistakenly or inadvertently, has used language which plainly brings a subject matter into a statute, its word is final—save for questions of constitutional power which have not even been intimated here." *Unexcelled Chemical Corp.* v. *United States*, 345 U.S. 59, 64 (1953). In this respect therefore the judgment of the District Court is reversed; in all other respects it is affirmed.

It is so ordered.

ROBINSON, *Circuit Judge*, with whom MCCREE, *Circuit Judge*, joins in Parts I-III, concurring in part and dissenting in part: Save for one aspect, I join in the court's disposition of this appeal[1] and, save for that aspect and

[1] The Act provides for judicial review in the courts of appeals of orders establishing motor vehicle safety standards "under section 103 [15 U.S.C. § 1392 (1970] . . . ." National Traffic and Motor Vehicle Safety Act of 1966, Pub.L. No. 89-563, tit. I, § 105(a)(1), 80 Stat. 720 (1966), 15 U.S.C. § 1394(a)(1) (1970). We have held that nonstatutory remedies are available to enable review of § 103 orders only in very special and limited circumstances. *Nader* v. *Volpe*, —— U.S.App.D.C. ——, 466 F.2d 261 (1972). However, the record makes it clear that in fashioning the regulations under

another, in Judge Robb's opinion for the court. My first disagreement relates to the basis upon which it is concluded that urban and suburban transit systems, as intrastate carriers, are subject to the restrictions on regrooved tires[2] imposed by Section 204(a) of the Act[3] and its implementing administrative regulations.[4] I subscribe

attack the Secretary did not purport to act pursuant to § 103; and as the court now holds, see *ante* pp. 13, 15-16, those regulations were promulgated, not under § 103, but rather under § 204(a), 15 U.S.C. § 1424 (1970). Since the Act does not specify any method for reviewing action taken pursuant to § 204(a), it follows, despite the apparent anomaly, that the District Court had jurisdiction to entertain appellants' challenge. Administrative Procedure Act § 10(b), 60 Stat. 243 (1946), as amended, 5 U.S.C. § 703 (1970). Compare *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 139-48 (1967); *Independent Broker-Dealers Trade Ass'n* v. *SEC*, 142 U.S. App.D.C. 384, 389-95, 442 F.2d 132, 137-43, *cert. denied*, 404 U.S. 828 (1971); *Elmo Div. of Drive-X Co.* v. *Dixon*, 121 U.S.App.D.C. 113, 115, 116, 348 F.2d 342, 344, 345 (1965).

[2] *Ante* pp. 16-18.

[3] "No person shall sell, offer for sale, or introduce for sale or deliver for introduction in interstate commerce, any tire or motor vehicle equipped with any tire which has been regrooved, except that the Secretary may by order permit the sale of regrooved tires and motor vehicles equipped with regrooved tires which he finds are designed and constructed in a manner consistent with the purposes of this chapter." National Traffic and Motor Vehicle Safety Act of 1966, Pub.L. No. 89-563, tit II, § 204(a), 80 Stat. 729 (1966), 15 U.S.C. § 1424(a) (1970).

[4] Regrooved Tire Regulations, 49 C.F.R. §§ 569.1 *et seq.* (1972). Two provisions of § 569.7 of the regulations are particularly involved. One is § 569.7(a) providing that "[n]o person shall sell, offer for sale, or introduce for sale or deliver for introduction into interstate commerce regrooved tires produced by removing rubber from the surface of worn tire tread to generate a new tread pattern unless the tires conform to" specified requirements. The other provision is § 569.7(b) providing that "[a]ny person who regrooves tires and leases them to owners or operators of motor vehicles and any person who regrooves his own tires for use on motor vehicles is considered to be a person delivering for introduction into interstate commerce within the meaning of" the regulations.

wholeheartedly to that conclusion, but for reasons which differ fundamentally from Judge Robb's rationale.[5] My second disaccord is with the holding that the exemption clause of Section 204(a) [6] does not authorize the Secretary of Transportation to allow deliveries of regrooved tires for introduction into interstate commerce when he finds that the tires have been designed and constructed consistently with the purposes of the Act.[7] In my view the exemption clause, properly construed, confers that power, and the Secretary's regulation exercising it [8] is valid.[9]

I

The great majority of the Transit systems complaining of the proscriptions on use of regrooved tires [10] are engaged exclusively in the transportation of passengers wholly within the territorial limits of a single state. If their operations are neatly covered by the Act at all, it is because of the prohibition in Section 204(a) on "deliver[y] for introduction in interstate commerce" of "any tire or motor vehicle equipped with any tire which has been regrooved. . . ." [11] As the court holds, there is a

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[5] Parts I-III, *infra*.

[6] See note 3, *supra*.

[7] *Ante* pp. 18-19.

[8] See note 4, *supra*.

[9] Part IV, *infra*.

[10] The parties complaining here are the American Transit Association, functioning as the national organization for the local transit industry in the United States, composed of more than 200 companies operating motor buses in 40-odd states and the District of Columbia: Milwaukee and Suburban Transportation Corporation, operating in Milwaukee, Wisconsin, and its suburbs; and The City Transit Company, operating in Dayton, Ohio, and its environs, and on charters wholly within Ohio.

[11] The remaining prohibitions of § 204(a), see note 3, *supra*, do not extend to the mere act of regrooving a tire or, except dubiously, to the leasing of regrooved tires.

"deliver[y]" when there is a physical movement toward introduction into commerce,[12] and the record demonstrates that transit systems mount and use regrooved tires on their buses.[13] The only question remaining, then, is whether "the intrastate runs made by these buses constitute an introduction in interstate commerce."[14]

The Act defines "interstate commerce" as "commerce between any place in a State and any place in another State, or between places in the same State through another State."[15] While that definition is in terms supplied for the Act's Title I provisions,[16] surely as an orthodox definition of interstate commerce it supplies the meaning of that term when used in Title II, of which Section 204(a) is a part. On so much of the problem the parties seem agreed, but then the disagreement begins in earnest.

The transit systems do not question the authority of Congress to regulate intrastate activities which affect interstate commerce.[17] They argue, however, that transpor-

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[12] *Ante* p. 15.

[13] This practice is widespread in the motorbus industry. See Part IV, *infra*.

[14] See note 3, *supra*.

[15] National Traffic and Motor Vehicle Safety Act of 1966, Pub.L. No. 89-563, tit. I, § 102(9), 80 Stat. 718 (1966), 15 U.S.C. § 1391(9) (1970).

[16] The definitions provided in § 102 of the Act, 15 U.S.C. § 1391 (1970), are for the defined terms "[a]s used in . . .[T]itle [I]."

[17] See *Katzenbach* v. *McClung*, 379 U.S. 294, 301-05 (1964); *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 247, 248, 253-61 (1964); *NLRB* v. *Reliance Fuel Oil Corp.*, 371 U.S. 224, 225-27 (1963); *NLRB* v. *Jones & Laughlin Steel Co.*, 301 U.S. 1, 31-32, 37-40 (1937); *Wisconsin R.R. Comm'n* v. *Chicago, B & Q. R.R.*, 257 U.S. 563, 579-91 (1922); *Southern R.R.* v. *United States*, 222 U.S. 20, 26-27 (1911); *Hipolite Egg Co.* v. *United States*, 220 U.S. 45, 51-58 (1911); *Lottery Case (Champion* v. *Ames)*, 188 U.S. 321, 345-62 (1903). See generally Stern, *The Scope of the Phrase Interstate Commerce*, 41 *A.B.A.J.* 823, 871 (1955); Stern, *That Commerce Which Concerns More States Than One*, 47 Harv.L. Rev. 1335 (1934).

tation service performed wholly within the boundaries of a state is presumptively subject only to state controls,[18] and that the Act does not negate that presumption. On the other hand, the Secretary asserts that virtually all public roads are pathways of interstate commerce,[19] and that buses traveling those roads become inseparably intermingled with interstate traffic and thus are "introduc[ed]" into interstate commerce. Judge Robb rejects this rationale and substitutes his view that a vehicle equipped with regrooved tires is "introduced" therein because it is itself making or it is rationally presumed that some day it will make, an interstate trip.[20]

I cannot subscribe to that position.[21] The statutory and administrative embargo on regrooved tires applies, of

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[18] See note 40, *infra*, and accompanying text.

[19] See discussion in Part III, *infra*.

[20] *Ante* pp. 17-18.

[21] Judge Robb's conclusion that transit buses are subject to the Act is rested partly on the likelihood that at some time in the future they will be driven from one state to another. That is an assumption unsupported by the record, and one which I am unable to share. I daresay that many motor vehicles—particularly old-model local transit buses as well as privately-owned jalopies having regrooved tires—will never venture anywhere near a state line. I believe, though, that when operated on public highways bearing interstate traffic, they all come under the ban of the Act.

Nor can I agree with Judge Robb's further conclusion that a regrooved tire is brought under the ban of the Act by an administrative presumption that at some future time it will travel interstate, whether it really does so or not. It is apparent that if that were the case, every regrooved tire produced since the effective date of the Act is encompassed by it, and the line which § 204(a) draws between interstate and intrastate commerce is obliterated. The activity statutorily banned, for present purposes, is the delivery of a regrooved tire for introduction into interstate—not intrastate—commerce. In my view, an actual introduction of the tire into interstate commerce is the constitutional fact upon which the validity of the statutory proscription depends and the jurisdictional fact upon which administrative regulation must rest.

course, to those mounted on vehicles actually moving in interstate commerce. Beyond that, however, I believe the embargo applies to their use, but only to their use, on public thoroughfares upon which interstate traffic is moving.

II

The tone of the Act is set by the congressional declaration that its purpose "is to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents."[22] To that end Congress found it "necessary," among other things, "to establish motor vehicle safety standards[23] for motor vehicles[24] and equipment[25] in inter-

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[22] "Congress hereby declares that the purpose of this chapter is to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents. Therefore, Congress determines that it is necessary to establish motor vehicle safety standards for motor vehicles and equipment in interstate commerce; to undertake and support necessary safety research and development; and to expand the National Driver Register." National Traffic and Motor Vehicle Safety Act of 1966, Pub.L. No. 89-563, 80 Stat. 718 (1966), 15 U.S.C. § 1381 (1970).

[23] " 'Motor vehicle safety standards' means a minimum standard for motor vehicle performance, or motor vehicle equipment performance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria." *Id.*, tit. I, § 102(2) 80 Stat. 718 (1966), 15 U.S.C. § 1391(2) (1970.

[24] See text *infra* at note 28.

[25] " 'Motor vehicle equipment' means any system, part, or component of a motor vehicle as originally manufactured or any similar part or component manufactured or sold for replacement or improvement of such system, part, or component or as any accessory, or addition to the motor vehicle, any device, article or apparel not a system, part, or component of a motor vehicle (other than medicines, or eye-glasses prescribed by a physican or other duly licensed practitioner), which is manufactured, sold, delivered, offered, or intended for use exclusively to safeguard motor vehicles, drivers, passengers, and other highway users from risk of accident, injury, or death." National Traffic and Motor Vehicle Safety Act of 1966, Pub.L. No. 89-563, tit. I, § 102(4), 80 Stat. 718 (1966), as amended, 15 U.S.C. § 1391(4) (1970).

state commerce,"[26] and Congress gave each of these components a comprehensive meaning.[27] Importantly, a "motor vehicle" is "any vehicle driven or drawn by mechanical power manufactured primarily for use on the public streets, roads, and highways, except any vehicle operated exclusively on a rail or rails."[28] And "motor vehicle safety" is defined as "the performance of motor vehicles or motor vehicle equipment in such a manner that the public is protected against unreasonable risk of accidents . . . and is also protected against unreasonable risk of death or injury to persons in the event accidents do occur. . . ."[29] It could hardly be more evident that, in the interest of public safety, Congress gave the Act an expansive coverage.

In my view, every motor vehicle moving interstate or with interstate traffic on one or more regrooved tires is intercepted by the broad sweep of the Act. It bears repeating that Congress possessed the constitutional power to give the interdiction on regrooved tires that wide a range,[30] and but for some self-limitation found within the Act, it seems clear that we would be obliged to give Section

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[26] See text *supra* at note 15.

[27] As previously stated, see text *supra* at note 16, § 102, the definitional section of the Act, 15 U.S.C. § 1391 (1970), is in terms confined to Title I. But the provisions of Title II complement those of Title I, and the definitions make clear the reach of the Act.

[28] National Traffic and Motor Vehicle Safety Act of 1966, Pub.L. No. 89-563, tit. I, § 102(3), 80 Stat. 718 (1966), 15 U.S.C. § 1391(3) (1970).

[29] " 'Motor vehicle safety' means the performance of motor vehicles or motor vehicle equipment in such a manner that the public is protected against unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles and is also protected against unreasonable risk of death or injury to persons in the event accidents do occur, and includes nonoperational safety of such vehicles." *Id.*, tit. I, § 102(1), 80 Stat. 718 (1966), 15 U.S.C. § 1391(1) (1970).

[30] See cases cited *supra* note 17.

204(a) that effect. But unlike the transit appellants, I am unable to accept the Act's definition of interstate Commerce[31] as a delimitation—indeed, a destructive one—of the wide scope which Congress otherwise so plainly ordained for the Act.[32]

The statutory definition of interstate commerce is not unnaturally restrictive; it is merely a restatement of the commonplace meaning of the term—a term, however, connoting a long reach.[33] Moreover, the statutory restriction on regrooved tires is not directly on their use on vehicles embarked on interstate travel but, in the congressional language with which we are more immediately concerned, on "deliver[y] for introduction" of such tires, or vehicles rolling on them, "in interstate commerce."[34] I encounter no difficulty whatever in reading that prohibition as an injunction, not merely against the operation of such tires and vehicles on interstate journeys, but also against their "deliver[y] for introduction" into the stream of interstate traffic. That construction is much more consonant with the comprehensive treatment the Act gives the matter of vehicle and equipment safety. It is more in keeping, too, with the express congressional purpose to preempt the field.

One of the basic considerations leading to adoption of the Act was the realization that "[w]hile the contribution of the several States to automobile safety has been significant, and justifies securing to the States a consultative role in the setting of standards, the primary responsibility for regulating the national automotive manufacturing industry must fall squarely upon the Federal Government."[35] In discharge of that responsibility, Section 103(d) of the

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[31] See text *supra* at note 15.

[32] See text *supra* at notes 22-29.

[33] See cases cited *supra* note 17.

[34] See note 3, *supra*.

[35] S.Rep. No. 1301, 89th Cong., 2d Sess. 4 (1966).

Act flatly denies to the states authority to establish or continue in effect any motor vehicle or equipment safety standard not identical to the relevant federal standard, except higher standards for vehicles and equipment procured for their own use.[36] Thus Congress preempted virtually the entire field of safety standards to the extent of any applicable federal standard.[37]

Federal preemption in the area of highway safety hardly tolerates the notion of half-hearted invocation of the interstate commerce power. It connotes, rather, not only a federal purpose to move the states out but also a purpose to move the Federal Government in. Nor, without indulging in the ludicrous assumption that the possibility of a regulatory gap was left open,[38] can it be concluded that Congress contemplated less than full exploitation of the commerce power. Put another way, it seems "clear that the purpose of the Act was to extend federal control in this

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[36] "Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard." National Traffic and Motor Vehicle Safety Act of 1966, Pub.L. No. 89-563, tit. I, § 103 (d), 80 Stat. 719 (1966), 15 U.S.C. § 1392(d) (1970).

[37] See *Chrysler Corp.* v. *Rhodes*, 416 F.2d 319, 322-23, 325 (1st Cir. 1969); *Chrysler Corp.* v. *Tofany*, 419 F.2d 499, 508-11 (2d Cir. 1969).

[38] The states, of course, are under no compulsion to legislate on the subject. Thus the possibility—indeed the probability—of the regulatory gap mentioned in text.

field throughout the farthest reaches of the channels of interstate commerce." [39] I would abide that aim, and construe the coverage of the Act liberally to that end.[40]

III

There are considerations additional to the statutory language which support the thesis that the normal daily operations of the transit systems' buses may "introduc[e]" them and their regrooved tires "in interstate commerce." [41] "In determining what constitutes 'commerce,' " we must be "guided by practical considerations," [42] and the realities of motor vehicle traffic today make it evident that Congress must have intended that the Act's restraint on regrooved tires would treat motor vehicles in an interstate flow without distinction on account of origin or destination.

Our public roadways are the arteries of massive vehicular traffic. Vehicles headed interstate as well as those terminating intrastate abound our highways the length and breadth of the Nation. The Secretary asserts that practically all public thoroughfares serve the never-ending demands of interstate travel,[43] and that may well be, but in any event the fact in that regard is not critical to the question at hand. The important fact—one sufficiently notorious to legitimately attract judicial notice—is that with millions of motor vehicles traversing the vast network of public roadways across the country, it is well nigh inevitable

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[39] *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 567 (1943).

[40] This discussion, I submit, fully answers the contention of the transit appellants that Congress entrusted the regulation of tires on intrastate vehicles to the states.

[41] See note 3, *supra*.

[42] *Oeverstreet* v. *North Shore Corp.*, 318 U.S. 125, 128 (1943).

[43] The transit appellants point out that the particular streets and roads over which their buses provide service are not specified or otherwise identified in the record. In the view I take of the matter, that is immaterial. See the discussion following in text.

that each [44] will, at some time or another during its service lifetime, share its route with one or more interstate travelers, whether or not it is itself then engaged in interstate travel. When it does have among its highway companions an interstate voyager, I am satisfied that a relationship supporting federal regulation has arisen.[45] And I have no doubt that as a class the buses utilized by the local transit industry are not per se outside the regulatory domain.[46]

It cannot be gainsaid that a motor vehicle on an intrastate trip, no less than one proceeding interstate, is a constant and serious threat to the traffic movement on its route if its tires are unsafe. The tire that fails is selective neither of the vehicles nor the occupants which it is likely to victimize; an untrustworthy tire jeopardizes closeby interstate and intrastate travel alike. In light of the stated legislative goal of "reduc[ing] traffic accidents and deaths and injuries to persons resulting from traffic accidents," [47]

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[44] It will be recalled that the only type of motor vehicle to which the Act applies is one "manufactured primarily for use on the public streets, roads, and highways, . . ." National Traffic and Motor Vehicle Safety Act of 1966, Pub.L. No. 89-563, tit. I § 102(3), 80 Stat. 718 (1966), 15 U.S.C. § 1319(3) (1970), quoted in text *supra* at note 28.

[45] See cases cited *supra* note 17.

[46] There are some 1,100 local transit systems across the United States operating about 50,000 motor buses and transporting annualy more than 6.5 billion revenue passengers.

[47] See note 22, *supra*. As the Senate Commerce Committee stated:

> It should not be necessary to call again the grim roll of Americans lost and maimed on the Nation's highways. Yet the compelling need for the strong automobile safety legislation which the Commerce Committee today is reporting lies embodied in those statistics: 1.6 million dead since the coming of the automobile; over 50,000 to die this year. And, unless the accelerating spiral of death is arrested, 100,000 Americans will die as a result of their cars in 1975.

S.Rep. No. 1301, 89th Cong. 2d Sess. at 1-2 (1966).

it is incongruous that Congress would restrict the use of regrooved tires on vehicles journeying interstate and at the same time leave closeby vehicles bound intrastate wholly free to use them. If indeed Congress has not made its wish manifest from what it has said, I would not attribute such an extraordinary regulatory technique to the effort that culminated in the Act.

Lest it be forgotten, the statutory prohibition on regrooved tires related to the issue at hand is specifically on their "deliver[y] for introduction in interstate commerce."[48] The Secretary's regulations seem to outlaw no more.[49] When a regrooved tire makes its appearance on a public thoroughfare traversed by vehicles moving toward interstate destinations, it is clear enough to me that there has been an "introduction" of the tire and its bearer-vehicle into the stream of interstate commerce, irrespective of where that vehicle is going or coming from. In a very real sense, the vehicle and its regrooved tire have become "so closely related to such commerce as to be in practice and in legal contemplation a part of it."[50] For purposes of determining the applicability of the statutory and administrative interdictions, I would recognize that relationship for what it actually is.

What so plainly emerges for me from a reading of the statutory language in the context of traffic reality draws strong support from the case law. The phrase "introduction in interstate commerce" seems not itself to have received a reported judicial construction, but a term of analogous import has received attention in the courts. In *Overstreet* v. *North Shore Corporation*,[51] the Supreme Court

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[48] See note 3, *supra*.

[49] See note 4, *supra*.

[50] *Overstreet* v. *North Shore Corp.*, *supra* note 42, 318 U.S. at 129, quoting *Pedersen* v. *Delaware, L. & W. R.R.*, 229 U.S. 146, 151 (1913).

[51] *Supra* note 42.

was called upon to investigate the limits of the phrase "engaged in commerce" as used in the Fair Labor Standards Act of 1938.[52] The issue was whether employees of a private corporation engaged in maintaining and operating a toll road and drawbridge over a navigable waterway were so engaged under the Act. Answering the question in the affirmative, the Court pointed out that "[v]ehicular roads and bridges are . . . indispensable to the interstate movement of persons and goods,"[53] and that "[i]f they are used by persons and goods passing between the various States, they are instrumentalities of interstate commerce."[54] Accordingly, the Court held, "[t]hose persons who are engaged in maintaining and repairing such facilities should be considered as 'engaged in commerce,'"[55] and so also should "operational employees whose work is just as closely related to the interstate movement."[56]

This example could be repeated, but it suffices to note that by no means does *Overstreet* stand alone.[57] The rele-

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[52] Act of June 25, 1938, ch. 676, §§ 6(a), 7(a), 52 Stat. 1062-63, as amended, 29 U.S.C. §§ 206(a), 207(a) (1970). That legislation defines "commerce" as "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." *Id.* § 3(b), 52 Stat. 1060, as amended, 29 U.S.C. § 203(b) (1970).

[53] *Overstreet* v. *North Shore Corp.*, *supra* note 42, 318 U.S. at 129.

[54] *Id.* at 129-30.

[55] *Id.* at 130.

[56] *Id.*

[57] Compare *Alstate Constr. Co.* v. *Durkin*, 345 U.S. 13, 15-17 (1953); *Boutell* v. *Walling*, 327 U.S. 463, 466 (1946); *Walling* v. *McGrady Constr. Co.*, 156 F.2d 932, 934-36 (3d Cir.), *cert. denied*, 329 U.S. 785 (1946); *Crook* v. *Bryant*, 265 F.2d 541, 542-44 (4th Cir. 1959); *Emulsified Asphalt Prods. Co.* v. *Mitchell*, 222 F.2d 913, 914 (6th Cir. 1955); *Wirtz* v. *Crystal Lake Crushed Stone Co.*, 327 F.2d 455, 458 (7th Cir. 1965); *Austford* v. *Goldberg*, 292 F.2d 234, 236-39 (8th Cir. 1961); *Walling* v. *Craig*, 53 F.Supp. 479, 483 (D. Minn. 1943).

vance of the "engaged-in-commerce" cases to our problem lies in the readiness with which the "practical" test [58] of relationships to commerce provides the solution.[59] Like the intrastate bus driver, neither the road maintainer, the toll gatherer nor the drawbridge operator is himself making an interstate trip, but each performs a function in which a potential impact upon interstate traffic inheres. The vital inquiry in these cases "is not whether the . . . activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it." [60]

That, in my view, is the standard for determining whether a regrooved tire on a vehicle making an intrastate journey on a public highway upon which interstate traffic is moving has been "introduc[ed] in interstate commerce." It matters not that the vehicle in question begins and ends its trip within a single state. The vehicle's presence on the highway far surpasses "activities [which merely] affect or indirectly relate to interstate commerce." [61] When it intermingles with vehicles comprising the interstate flow, in the most literal sense it is "actually in" and "so closely related to the movement of the commerce as to be a part of it." [62] By any "practical" measure of the situation,[63] I submit, the vehicle has been "introduc[ed] in interstate commerce." [64]

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[58] See text *supra* at note 42.

[59] See, *e.g.*, *Overstreet* v. *North Shore Corp.*, *supra* note 42, 318 U.S. at 128-30.

[60] *McLeod* v. *Threlkeld*, 319 U.S. 491, 497 (1943). See also *Overstreet* v. *North Shore Corp.*, *supra* note 42, 318 U.S. at 129.

[61] See text *supra* at note 60.

[62] See text *supra* at note 60.

[63] See text *supra* at note 42.

[64] Compare *Southern Ry.* v. *United States*, 222 U.S. 20, 24-27 (1911).

The Secretary has concluded similarly. He holds that notwithstanding that the buses of local transit systems are solely on intrastate runs, the prohibitions of the Act may obtain. As a contemporary administrative interpretation of a law entrusted to the Secretary's administration, the regulations are entitled to great weight in court.[65] Beyond that, I consider that construction of the Act to be eminently correct. I would accord the regulations the respect they are due, and sustain them for the reasons discussed.

IV

My second disagreement is with the court's holding that the Secretary's exemption regulation, which removes from the ban of Section 204(a) all regrooved tires meeting specified standards,[66] is invalid to the extent that it allows such tires to be delivered for introduction into interstate commerce.[67] While a literal construction of Section 204(a) might suggest that result,[68] its practical effect is a substantial negation of the exemption power conferred by that section and, in my view, an unrealistic restriction on administrative policy in regard to regrooved tires. I submit that the exemption clause of Section 204(a) summons, rather, a liberal interpretation which will enable achievement of the purposes which Congress manifestly had in mind and that, given that construction, the regulation must be sustained.

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[65] *Udall* v. *Tallman*, 380 U.S. 1, 11 (1965); *Power Reactor Dev. Co.* v. *International Union of Elec., Radio & Mach. Workers*, 367 U.S. 396, 408 (1961); *United States* v. *American Trucking Ass'n*, 310 U.S. 534, 549 (1949); *Norwegian Nitrogen Prods. Co.* v. *United States*, 288 U.S. 294, 324-25 (1933); *Fawcus Mfg. Co.* v. *United States*, 282 U.S. 375, 378 (1931).

[66] 49 C.F.R. § 569.7(a) (1972), quoted in part *supra* note 4.

[67] *Ante* pp. 18-19.

[68] See note 3, *supra*.

Congress framed the prohibitory portion of Section 204(a) in terms of a ban on "sell[ing], offer[ing] for sale, or introduc[ing] for sale or deliver[y] for introduction in interstate commerce, any" regrooved tire.[69] In fashioning the exception to that general prohibition, however, Congress stated "that the Secretary may by order permit the sale of regrooved tires and motor vehicles equipped with regrooved tires which he finds are designed and constructed in a manner consistent with the purposes of" the Act.[70] At first blush, then, it might appear that the Secretary's exemption power is narrower than the statutory injunction; in other words, that while the Secretary may license "sale[s]" of regrooved tires and motor vehicles mounting regrooved tires which qualify for exemption, he lacks authority, irrespective of the circumstances, to sanction any of the other forbidden activities.[71]

If that be so, the regulation on regrooved tires is overbroad, for it would allow sales and, as well, "offer[s] for sale, introduc[tions] for sale [and] deliver[ies] for introduction into interstate commerce" if the tires conform to specified requirements.[72] Thus the regulation would countenance both sale and nonsale transactions culminating in an introduction of regrooved tires into interstate channels provided they meet standards which the Secretary deems harmonious with congressional objectives.

I think the regulation reads the purposes of Section 204(a)'s exemption clause correctly. When a court is called upon to interpret a statute, its first and primary source of legislative intent is the language which the legislature saw fit to employ.[73] But "literalness may strangle

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[69] See note 3, *supra*.

[70] See note 3, *supra*.

[71] See *ante* pp. 18-19.

[72] See note 4, *supra*.

[73] *E.g.*, *Maryland & D. C. Rifle & Pistol Ass'n* v. *Washington*, 142 U.S. App. D.C. 375, 378, 442 F.2d 123, 126 (1971).

meaning,"[74] and a literal meaning may be rejected "where acceptance of that meaning would lead to absurd results, . . . or would thwart the obvious purpose of the statute . . . ."[75] By my estimate, precisely those consequences follow from the interpretation which the majority places on the exemption clause.

A literal construction of that clause produces anomalous results. The clause unmistakably grants the Secretary power to except sales of regrooved tires when they satisfy his design and construction standards, but it does not explicitly authorize the exception of anything but a "sale."[76] Nonetheless, since tires can hardly be sold without previous offer and introduction for that purpose, it must necessarily follow, as the regulation provides,[77] that regrooved tires which qualify under the exemption for sale can also be offered and introduced for sale. But if Section 204(a) is read according to its letter, not even qualified regrooved tires can be delivered for introduction—through a nonsale transaction—into interstate commerce as the exemption regulation further provides. My colleagues give the exemption clause of Section 204(a) that reading, and hold that the exemption regulation is invalid to the extent that it undertakes to provide to the contrary.[78]

This interpretation ignores the realities of regrooved-tire usage, and wreaks havoc upon that usage. The record contains unchallenged facts portraying the role of the regrooved tire in motor carrier operations, and those facts

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[74] *Lynch* v. *Overholser*, 369 U.S. 705, 710 (1962), quoting *Utah Junk Co.* v. *Porter*, 328 U.S. 39, 44 (1966).

[75] *Helvering* v. *Hammel*, 311 U.S. 504, 510-11 (1941), citing *United States* v. *Katz*, 271 U.S. 354, 362 (1926); *Haggar Co.* v. *Helvering*, 308 U.S. 389, 394 (1940).

[76] See note 3, *supra*.

[77] See note 4, *supra*.

[78] *Ante* pp. 18-19.

may profitably be recounted. Major tire manufacturers produce commercial tires which are specially designed for regrooving, after the original tread becomes worn, without degradation of tire quality or compromise of safety. Some operators purchase these tires, use them and, when the time arrives, do the regrooving themselves or arrange for it to be done. Many others lease regroovable tires, on a mileage basis, from manufacturers who perform the maintenance and regrooving services. If the court's construction of the exemption clause of Section 204(a) is correct, these techniques are now taboo.

The use of regrooved tires of regroovable quality in commercial transportation is widespread and, from all that appears from the record, is innocuous.[79] In 1967—shortly before the advent of the Act—more than a half-million regrooved tires were in service in the United States. Then, with but one exception, regrooved tires were used by every urban and interurban fleet of more than 50 buses, and by every taxicab fleet of more than 100 units. Over the many years that the practice of regrooving commercial tires has endured, they have enjoyed an enviable record for highway safety. One leading tire manufacturer reports the regrooving of nearly two million bus and taxicab tires over a twenty-year period without any record of tire failure caused by regrooving. Another boasts an unblemished accident record for the same period, and still another for a ten-year span and seven billion vehicle miles.

Viewed against this backdrop, I am unable to accept the sale-nonsale distinction as a proper interpretative consequence of Section 204(a)'s exemption clause. The central theme of the Act is highway safety,[80] and that distinction

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[79] I speak only of commercial tires specially designed and manufactured for regrooving. The practice of regrooving passenger car tires is universally condemned. See S. Rep. No. 1089, 89th Cong., 2d Sess. 5 (1966).

[80] See Part II, *supra*.

bears no relationship whatever to that objective. I cannot believe that Congress intended that a regrooved tire fit for sale in interstate commerce would be deemed unfit for use in interstate commerce simply because it was introduced by a process other than sale. I cannot believe that Congress intended to differentiate tires, in terms of the exemption power, merely according to the nature of the transaction by which they reach an interstate channel. Nor can I believe that Congress intended to outlaw arrangements by which the tire industry has made regroovable and regrooved tires available to the motor carrier industry without any visible danger to interstate commerce.[81]

The inclusion of the exemption clause in Section 204(a) makes it evident that Congress felt that regulated tire-regrooving is perfectly feasible, and that the Secretary is capable of devising standards by which safe and unsafe regrooved tires can be distinguished. The Secretary's regulation exempts only tires which are designed for the regrooving process,[82] and which are regrooved in conformity with specified requirements.[83] Abiding ample precedent,[84]

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[81] The record leaves unclear the extent to which tires already regrooved, as distinguished from regroovable tires, are sold. But the record makes it ever so plain that the leasing of regroovable tires is very widespread. Indeed, some leading tire manufacturers make such tires available only on a leasing basis. In such instances, the tire remains largely under the supervision and control of the manufacturer throughout its service lifetime, with concomitant contributions to the safety of its use.

[82] One of the requirements which regrooved tires must meet is that "[t]he tire being regrooved shall be a regroovable tire." 49 C.F.R. § 369.7(a)(1) (1972). "Regroovable tire" is defined as "a tire, either original tread or retread, designed and constructed with sufficient tread material to permit renewal of the tread pattern or the generation of a new tread pattern in a manner which conforms to" the regulation. *Id.* § 369.3(c) (1972).

[83] *Id.* § 369.7(a)(1)-(6) (1972).

[84] See cases cited *supra* notes 74-75.

and construing the exemption clause in light of the Act's pervading goal of traffic safety,[85] I would accept that clause as a grant to the Secretary of authority to sanction interstate uses of all regrooved tires which meet the requirements his regulation has set.

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[85] Compare *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341, 354-57 (1968); *First Nat'l Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 261-62 (1966); *Hudson Distributors, Inc.* v. *Eli Lilly & Co.*, 377 U.S. 386, 392-94 (1964); *Commissioners* v. *Bilder*, 369 U.S. 499, 502-04 (1962).

APPENDIX B

Regulations on Regrooved Tires and Accompanying Statement of the Federal Highway Administration

TITLE 49—TRANSPORTATION

Chapter III—Federal Highway Administration

DEPARTMENT OF TRANSPORTATION

Subchapter A—Motor Vehicle Safety Regulations
Part 369—Regrooved Tire Regulations

Section

369.1 Purpose and Scope
369.3 Definitions
369.5 Applicability
369.7 Requirements
369.9 Labeling of Regroovable Tires

369.1 PURPOSE AND SCOPE

This part sets forth the conditions under which regrooved and regroovable tires manufactured or regrooved after the effective date of the regulation may be sold, offered for sale, introduced for sale or delivered for introduction into interstate commerce.

369.3 DEFINITIONS

(a) *Statutory Definitions.* All terms used in this part that are defined in Section 102 of the National Traffic and Motor Vehicle Safety Act of 1966 (15 U.S.C. 1391) are used as defined in the Act.

(b) *Motor Vehicle Safety Standard Definitions.* Unless otherwise indicated, all terms used in this part that are defined in the Motor Vehicle Safety Standards, Part 371, of this subchapter (hereinafter "The Standards"), are used as defined therein without regard to the applicability of a standard in which a definition is contained.

(c)"Regroovable tire" means a tire, either original tread or retread, designed and constructed with sufficient tread material to permit renewal of the tread pattern or the generation of a new tread pattern in a manner which conforms to this part.

(d) "Regrooved tire" means a tire, either original tread or retread, on which the tread pattern has been renewed or a new tread has been produced by cutting into the tread of a worn tire to a depth equal to or deeper than the molded original groove depth.

369.5 APPLICABILITY

(a) *General.* Except as provided in paragraph (b) of this section, this part applies to all motor vehicle regrooved or regroovable tires manufactured or regrooved after the effective date of the regulation.

(b) *Export.* This part does not apply to regrooved or regroovable tires intended solely for export and so labeled or tagged.

369.7 REQUIREMENTS

(a) *Regrooved Tires.* No person shall sell, offer for sale, or introduce for sale or deliver for introduction into interstate commerce regrooved tires produced by removing rubber from the surface of a worn tire tread to generate a new tread pattern unless the tires conform to the requirements set forth below:

(1) The tire being regrooved shall be a regroovable tire;

(2) After regrooving, cord material below the grooves shall have a protective covering of tread material at least 3/32-inch thick;

(3) After regrooving, the new grooves generated into the tread material and any residual original

molded tread groove which is at or below the new regrooved groove depth, shall have a minimum of 90 linear inches of tread edges per linear foot of tire circumference;

(4) After regrooving, the new groove width generated into the tread material shall be a minimum of 3/16-inch and a maximum of 5/16-inch;

(5) After regrooving, all new grooves cut into the tread shall provide unobstructed fluid escape passages; and

(6) After regrooving the tire shall not contain any of the following defects, as determined by a visual examination of the tire either mounted on the rim, or dismounted, whichever is applicable:

(i) cracking which extends to the fabric,

(ii) groove cracks or wear extending to the fabric, or

(iii) evidence of ply, tread, or sidewall separation.

(b) Any person who regrooves tires and leases them to owners or operators of motor vehicles and any person who regrooves his own tires for use on motor vehicles is considered to be a person delivering for introduction into interstate commerce within the meaning of this part.

(c) *Siped Tires.* No person shall sell, offer for sale, or introduce for sale or deliver for introduction into interstate commerce siped tires produced by cutting the tread surface of a regrooved or regroovable tire without removing rubber, if the tire cord material is damaged as a result of the siping process, or if the tire is siped deeper than the original, retread, or regrooved groove depth.

369.9 LABELING OF REGROOVABLE TIRES

(a) *Regroovable Tires.* After August 30, 1969, each tire designed and constructed for regrooving shall be labeled on both sidewalls with the word "Regroovable" molded on or into the tire in raised or recessed letters .025 to .040 inches. The word "Regroovable" shall be in letters .38 to .50 inches in height and not less than 4 inches and not more than 6 inches in length. The lettering shall be located in the sidewall of the tire between the maximum section width and the bead in an area which will not be obstructed by the rim flange.

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DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION

[49 CFR Part 369]*

[Docket No. 20; Notice No. 4]

PART 369—REGROOVED TIRES

The purpose of this amendment is to establish criteria under which regrooved tires may be sold or delivered for introduction into interstate commerce. The regulation allows only tires designed for the regrooving process to be regrooved; specifies dimensional and conditional requirements for the tire after the regrooving process; and sets forth labeling requirements for the tire which is to be regrooved.

Section 204(a) of the National Traffic and Motor Vehicle Safety Act of 1966 (15 U.S.C. 1424) provides that no person shall sell, offer for sale, or introduce for sale or delivery for introduction into interstate commerce, any tire or motor vehicle equipped with any tire which has been regrooved but gives the Secretary the authority to permit the sale of regrooved tires and motor vehicles equipped with regrooved tires when the regrooved tires are designed and constructed in a manner consistent with the purpose of the Act.

A Notice was published (32 F.R. 11579) affording interested persons an opportunity to present views, information and data to form the basis for permitting the sale and delivery for introduction into interstate commerce of regrooved tires and motor vehicles equipped with regrooved tires.

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* The Notice of Proposed Rule Making appearing in June 12, 1968, issue of the *Federal Register* (33 F.R. 8603) was issued under 23 CFR 256. Parts of the Code of Federal Regulations relating to motor vehicle safety were transferred to Title 49 by Part II of the *Federal Register* of December 25, 1968 (33 F.R. 19700).

After considering the comments, data, information received and the state-of-the-art a proposed regulation setting forth criteria to govern the regrooving of tires was published (33 F.R. 8603). All comments received have been considered.

As proposed, it was not clear that the definition of regroovable and regrooved tires would allow the regrooving of retreaded tires. Two comments asked whether the regulation would allow the established practice of regrooving a retreaded motor vehicle tire. The Administrator has determined that regrooving sound retreaded tires does not affect their level of safety performance. Accordingly, the regulation as issued is clarified so as to allow regrooving of both original tread and retreaded motor vehicle tires. There is presently under consideration a Federal motor vehicle standard for retreaded tires. When this standard is established, retreaded tires that are regrooved will have to conform to the retread requirements as well as the regrooved tire regulations.

Section 256.5(a)(3) as contained in the Notice of Proposed Rule Making would have required that, after the regrooving process, there be a protective covering of tread material at least 3/32-inch thick over the tire cord. Four comments asked that this requirement be deleted. It was argued that this would require the removal of regrooved tires with "many usable miles" remaining on the tires.

The 3/32-inch undertread requirement is directly comparable to the undertread of a new tire. It is considered necessary that there be 3/32 of an inch of rubber over the cord material as a protection against road hazard damage. Furthermore, this protection is considered essential in order to prevent moisture entering the ply material and subsequently causing deterioration of the tire fabric and ply adhesion. For these reasons, it is concluded that to allow an undertread of less than 3/32 of an inch would not be in the public interest.

One comment argued that a tire would have to be completely cut to determine the thickness of the undertread. Since it is acceptable practice to determine undertread depth by use of an awl and only a very limited degree of expertise is needed to make this measurement without causing damage to the tire, this argument has been rejected.

Section 256.5(a)(4) as contained in the Notice of Proposed Rule Making would have required that after regrooving, the tire have a minimum of 90 linear inches of tread edges per linear foot of tire circumference. Four comments requested clarification of this requirement as to whether the original molded tread was to be included in the measurement for this requirement. The initial intent of this requirement was to include only the newly cut grooves. However, after considering the fact that residual existent grooves offer tread edges which contribute to the traction of the tire, the regulation as issued is revised to allow that portion of the original tread pattern of a regroovable tire which is at least as deep as the new regroove depth to be included within the calculation of the 90 linear inches of tread edges required in each foot of tire circumference.

Section 256.5(a)(5) as contained in the Notice of Proposed Rule Making would have required that, after regrooving, the groove width be a minimum of 3/16-inch and a maximum of 5/16 inch. Four comments requested clarification whether this requirement applied to the original molded tread pattern as well as the tread pattern created by regrooving. It was not intended that this requirement apply to the original molded tread pattern and the regulation as issued is revised to make this clear.

One comment pointed out that the use of the term "tractionizing" within Section 256.5(b) was too general and that the proper term for crosscutting the tread without rubber removal is "siping." Accordingly, the regulation as issued is revised to reflect this suggestion.

Section 256.7 as contained in the Notice of Proposed Rule Making specified certain labeling requirements for regroovable and regrooved tires. Four comments contended that the labeling requirements should not be included within the regulation. Two other comments stated that the proposed labeling was too large and requested smaller size symbols and letters. The Administrator recognizes that several names or brands are used to identify regroovable tires and has therefore determined that concise identification of regroovable tires is needed. For this reason the regulation as issued requires molding on a regroovable tire the word "Regroovable," but permits lettering one half the size proposed in the Notice of Proposed Rule Making. However, with regard to the proposed requirement that each regrooving be indicated on the tire, it was found that such a requirement was not necessary in view of the minimum undertread requirement in the regulation, and that proposed requirement has been deleted.

In consideration of the foregoing, Part 369—Regrooved Tire Regulation set forth below is added to Title 49—Transportation, Chapter III—Federal Highway Administration, Department of Transportation, Subchapter A—Motor Vehicle Safety Regulations. This regulation becomes effective February 28, 1969.

This regulation is issued under authority of Sections 119 and 204 of the National Traffic and Motor Vehicle Safety Act of 1966 (15 U.S.C. 1407 and 1424) and the delegation from the Secretary of Transportation, Part I of the Regulations of the Office of the Secretary (49 C.F.R. § 1.4(c)).

Issued Jan. 17, 1969.

APPENDIX C

Pertinent Statutory Provisions

National Traffic and Motor Vehicle Safety Act of 1966,
15 U.S.C. §§ 1381-1425

[STATEMENT OF PURPOSE]

[15 U.S.C. § 1381] Section 1

Congress hereby declares that the purpose of this chapter is to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents. Therefore, Congress determines that it is necessary to establish motor vehicle safety standards for motor vehicles and equipment in interstate commerce; to undertake and support necessary safety research and development; and to expand the national driver register.

[15 U.S.C. § 1391] Section 102

* * * *

(5) "Manufacturer" means any person engaged in the manufacturing or assembling of motor vehicles or motor vehicle equipment, including any person importing motor vehicles or motor vehicle equipment for resale.

(6) "Distributor" means any person primarily engaged in the sale and distribution of motor vehicles or motor vehicle equipment for resale.

(7) "Dealer" means any person who is engaged in the sale and distribution of new motor vehicles or motor vehicle equipment primarily to purchasers who in good faith purchase any such vehicle or equipment for purposes other than resale.

* * * *

(9) "Interstate commerce" means commerce between any place in a State and any place in another State, or between places in the same State through another State.

Title I—Motor Vehicle Safety Standards

[15 U.S.C. § 1392] Section 103

(a) The Secretary shall establish by order appropriate Federal motor vehicle safety standards. Each such Federal motor vehicle safety standard shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms.

• • • •

(f) In prescribing such standards under this section the Secretary shall—

(1) consider relevant available motor vehicle safety data, including the results of research, development, testing and evaluation activities conducted pursuant to this Act;

(2) consult with the Vehicle Equipment Safety Commission, and such other State or interstate agencies (including legislative committees) as he deems appropriate;

(3) consider whether any such proposed standard is reasonable, practicable and appropriate for the particular type of motor vehicle or item of motor vehicle equipment for which it is prescribed; and

(4) consider the extent to which such standards will contribute to carrying out the purposes of this Act.

[15 U.S.C. § 1397] Section 108

(a) No person shall—

(1) manufacture for sale, sell, offer for sale, or introduce or deliver for introduction in interstate commerce, or import into the United States, any motor vehicle or item of motor vehicle equipment manufactured on or after the date any applicable Federal motor vehicle safety standard takes effect under this title unless it is in conformity with such standard except as provided in subsection (b) of this section;

• • • •

(b)(1) Paragraph (1) of subsection (a) shall not apply to the sale, the offer for sale, or the introduction or delivery for introduction in interstate commerce of any motor vehicle or motor vehicle equipment after the first purchase of it in good faith for purposes other than resale . . .

* * * *

[15 U.S.C. § 1398] Section 109

(a) Whoever violates any provision of section 108, or any regulation issued thereunder, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. Such violation of a provision of section 108, or regulations issued thereunder, shall constitute a separate violation with respect to each motor vehicle or item of motor vehicle equipment or with respect to each failure or refusal to allow or perform an act required thereby, except that the maximum civil penalty shall not exceed $400,000 for any related series of violations.

* * * *

[15 U.S.C. § 1399] Section 110

(a) The United States District courts shall have jurisdiction, for cause shown and subject to the provisions of rule 65(a) and (b) of the Federal Rules of Civil Procedure, to restrain violations of this title, or to restrain the sale, offer for sale, or the introduction or delivery for introduction in interstate commerce, or the importation into the United States, of any motor vehicle or item of motor vehicle equipment which is determined, prior to the first purchase of such vehicle in good faith for purposes other than resale, not to conform to applicable Federal motor vehicle safety standards prescribed pursuant to this title, upon petition by the appropriate United States attorney or the Attorney General on behalf of the United States. Whenever practicable, the Secretary

shall give notice to any person against whom an action for injunctive relief is contemplated and afford him an opportunity to present his views, and, except in the case of a knowing and willful violation, shall afford him reasonable opportunity to achieve compliance. The failure to give such notice and afford such opportunity shall not preclude the granting of appropriate relief.

• • • •

[15 U.S.C. § 1407] Section 119

The Secretary is authorized to issue, amend, and revoke such rules and regulations as he deems necessary to carry out this title.

Title II—Tire Safety

[15 U.S.C. § 1424] Section 204

(a) No person shall sell, offer for sale, or introduce for sale or deliver for introduction in interstate commerce, any tire or motor vehicle equipped with any tire which has been regrooved, except that the Secretary may by order permit the sale of regrooved tires and motor vehicles equipped with regrooved tires which he finds are designed and constructed in a manner consistent with the purposes of this Act.

(b) Violations of this section shall be subject to civil penalties and injunction in accordance with sections 109 and 110 of this Act.

(c) For the purposes of this section the term "regrooved tire" means a tire on which a new tread has been produced by cutting into the tread of a worn tire.

[15 U.S.C. § 1425] Section 205

In the event of any conflict between the requirements of orders or regulations issued by the Secretary under

this title and title I of this Act applicable to motor vehicle tires and orders or administrative interpretations issued by the Federal Trade Commission, the provisions of orders or regulations issued by the Secretary shall prevail.

Part II of the Interstate Commerce Act, 49 U.S.C. § 304(a) (1)

[49 U.S.C. § 304(a)(1)] Section 204

(a) It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

APPENDIX D

Order Denying Appellants' Petition for Rehearing

(Filed Aug. 22, 1973)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 71-1268

SEPTEMBER TERM, 1972

NATIONAL ASSOCIATION OF MOTOR BUS OWNERS, ET AL.
Appellants

v.

CLAUDE S. BRINEGAR, Secretary of Transportation

Before: McCree*, United States Circuit Judge for the Sixth Circuit; Robinson and Robb, Circuit Judges.

ORDER

On consideration of appellants' petition for rehearing, it is ORDERED by the Court that appellants' aforesaid petition is denied. *Per Curiam.*

Circuit Judge Robinson would grant appellants' petition for rehearing.

* Sitting by designation pursuant to Title 28 U.S. Code Section 291(a).

No. 73-794

In the Supreme Court of the United States

OCTOBER TERM, 1973

NATIONAL ASSOCIATION OF MOTOR BUS OWNERS, ET AL.,
PETITIONERS

v.

CLAUDE S. BRINEGAR, SECRETARY OF THE DEPARTMENT OF TRANSPORTATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
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In the Supreme Court of the United States

OCTOBER TERM, 1973

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NATIONAL ASSOCIATION OF MOTOR BUS OWNERS, ET AL., PETITIONERS

v.

CLAUDE S. BRINEGAR, SECRETARY OF THE DEPARTMENT OF TRANSPORTATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–38a) is reported at 483 F. 2d 1294. The order of the district court (C.A. App. 2a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1973. A timely petition for rehearing was denied on August 22, 1973 (Pet. App. 52a). The petition for a writ of certiorari was filed on November 16, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 204 of the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1424, which provides that "[n]o person shall * * * deliver for introduction in interstate commerce, any tire * * * which has been regrooved," applies to owners of bus or truck fleets who regroove their own tires.

2. Whether the Section 204 prohibition applies to intrastate motor carriers.

STATUTE AND REGULATION INVOLVED

1. Section 204 of the National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 729 as amended, 15 U.S.C. 1424, provides in part:

> (a) No person shall sell, offer for sale, or introduce for sale or deliver for introduction in interstate commerce, any tire or motor vehicle equipped with any tire which has been regrooved, except that the Secretary may by order permit the sale of regrooved tires and motor vehicles equipped with regrooved tires which he finds are designed and constructed in a manner consistent with the purposes of this Act.
>
> * * * * *
>
> (c) For the purposes of this section the term "regrooved tire" means a tire on which a new tread has been produced by cutting into the tread of a worn tire.

2. 49 C.F.R. 569.7 provides in part:

> (a) Regrooved Tires: No person shall sell, offer for sale, or introduce for sale or deliver for introduction into interstate commerce re-

grooved tires produced by removing rubber from the surface of a worn tire tread to generate a new tread pattern unless the tires conform to the requirements set forth below:

* * * * *

(b) Any person who regrooves tires and leases them to owners or operators of motor vehicles and any person who regrooves his own tires for use on motor vehicles is considered to be a person delivering for introduction into interstate commerce within the meaning of this part.

STATEMENT

Congress enacted in 1966 the National Traffic and Motor Vehicle Safety Act, 80 Stat. 718, *et seq.*, as amended, 15 U.S.C. 1381, *et seq.*, for the purpose of "reduc[ing] traffic accidents and deaths and injuries to persons resulting from traffic accidents" (15 U.S.C. 1381). Under Title I of that Act, the Secretary of Transportation is directed generally to establish safety standards for motor vehicles and items of motor vehicle equipment (Section 103(a), 15 U.S.C. 1392(a)). Title II of the Act, captioned "Tire Safety," provides specific directions to the Secretary concerning tires. Section 204(a), 15 U.S.C. 1424(a), provides that "[n]o person shall sell, offer for sale, or introduce for sale or deliver for introduction in interstate commerce" any regrooved tire,[1] "except that the Secre-

[1] Regrooved tires are tires "on which a new tread has been produced by cutting into the tread of a worn tire" (Section 204(c), 15 U.S.C. 1424(c)). Tires designed to be regrooved have extra rubber between the base of the original tread and the tire cord, so that new grooves can be cut into this excess rubber

tary may by order permit the sale of regrooved tires * * * which he finds are designed and constructed in a manner consistent with the purpose of this Act."[2]

Pursuant to this authority, the Federal Highway Administrator[3] promulgated regulations prescribing safety standards for regrooved tires and prohibiting the sale, offer for sale, introduction for sale, or delivery for introduction into interstate commerce, of regrooved tires that do not conform to those standards (49 C.F.R. 569.7(a)). The effect of the regulations is

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when the original treads are worn (C.A. App. 39a). Such tires are manufactured for the truck, bus, and taxi industries and are not distributed for use on private automobiles (C.A. App. 39a, 40a, 52a, 55a). Retreading and recapping, which are more familiar methods of rejuvenating old tires, involve the addition of new rubber to the tires.

"C.A. App." refers to the appendix in the court of appeals, a copy of which we lodged with the Clerk of this Court, in connection with our petition for a writ of certiorari in this case, No. 73-974.

[2] Section 204 evolved from a virtually identical provision in a tire safety bill that passed the Senate but was not acted on in the House during the second session of the 89th Congress (S. 2669, 89th Cong., 2d Sess.). This provision, which was originally limited to passenger cars, was incorporated into the broader Traffic and Motor Vehicle Safety Act, with its expanded definition of motor vehicle, during a conference on differing versions of the proposed Act (H. Rep. No. 1919, 89th Cong., 2d Sess.). The Act defines motor vehicle to include "any vehicle driven or drawn by mechanical power manufactured primarily for use on the public streets" (Section 102(3), 15 U.S.C. 1391(3)).

[3] The Secretary of Transportation initially delegated his authority under the Act to the Federal Highway Administrator (32 Fed. Reg. 5606-5607). The authority was subsequently delegated to the National Highway Traffic Safety Administrator (49 C.F.R. 501.2(a)).

thus to permit the sale and non-sale delivery of only those regrooved tires that conform to the standards.

The regulations also provide that "[a]ny person who regrooves tires and leases them to owners or operators of motor vehicles and any person who regrooves his own tires for use on motor vehicles is considered to be a person delivering for introduction into interstate commerce" (49 C.F.R. 569.7(b)). The effect of that provision is to apply the Secretary's safety standards to the many operators of commercial buses, trucks, and taxicab fleets who purchase or lease tires that are not "regrooved" but "regroovable,"[4] and who then either regroove the tires themselves or have the leasing company do the regrooving.

Petitioners, representing operators of intercity buses, local transit lines, and the trucking industry, brought this action[5] in the United States District Court for the District of Columbia seeking to enjoin the enforcement of the regulations on the ground, *inter alia,* that the Act was not intended to cover any person who regrooves his own tires or whose motor carrier operations are wholly intrastate. The district court, on cross-motions for summary judgment, upheld the regulations.

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[4] A "regroovable tire" is one "designed and constructed with sufficient tread material to permit renewal of the tread pattern or the generation of a new tread pattern" (49 C.F.R. 569.3 (c)).

[5] Some of the petitioners intervened as plaintiffs after the initial complaint was filed.

The court of appeals affirmed the judgment of the district court in all respects save one.*

ARGUMENT

The issues presented by this petition were correctly decided by the court of appeals, and there is no reason for further review.

1. Petitioners contend (Pet. 8–10) that commercial bus and truck operators who regroove their own tires must be exempted from the Act's coverage, because as self-regroovers they are "consumers," and the Act was intended to protect, not regulate, consumers. But Section 204 has a broader purpose than merely ensuring that commercial operators who purchase regroovable tires are protected as consumers. It is designed to protect the traveling public by regulating the quality and safety of regrooved tires that are delivered for introduction in interstate commerce. In regrooving their own tires, commercial operators are acting, in effect, as manufacturers of the tires at which the statute is aimed.

Petitioners rely (Pet. 9) on the "first purchase" exemption of Section 108(b)(1), 15 U.S.C. 1397(b)(1). That section excludes from Title I's prohibition against sales and non-sale deliveries of motor vehicles and items of motor vehicle equipment that do not conform to the Secretary's safety standards, deliveries

* A majority of the court held (Pet. App. 18a–19a) that the statute does not authorize the Secretary to permit the non-sale delivery of regrooved tires that meet the Secretary's safety standards. We have filed a petition for a writ of certiorari (No. 73–974) to review that portion of the court of appeals' judgment.

"after the first purchase * * * in good faith for purposes other than resale * * *." As the court of appeals correctly held, however, the Title I exemption does not apply to Title II. "[W]e find nothing to indicate that Congress intended the first purchase exception to be carried over to section 204" (Pet. App. 16a).

The reason for the difference is that many of the tires to which Section 204 is directed are purchased as "regroovable" and are "regrooved" later by the purchaser. An exemption for deliveries after the first purchase of *regrooved* tires thus would not benefit most self-regroovers unless it were construed to apply to deliveries after the first purchase of *regroovable* tires. In that case, however, the exemption would insulate from safety regulation nearly all commercially-used regrooved tires. This would directly contravene the intent of Congress to protect the public against unsafe regrooved tires.

2. Petitioners contend (Pet. 10–11) that the court of appeals' ruling leads to absurd results. They complain that, under the court's reading of the statute, regrooved tires that conform to the Secretary's safety standards may be sold but may not be "delivered," and that this has the effect of permitting commercial operators to regroove tires for sale but not for use on their own vehicles, despite their conformance with the standards.

We agree that the result distorts the statutory purpose. But the solution is not, as petitioners urge, to restrict the scope of the Act's prohibition against unsafe regrooved tires. Rather, as we have argued in our peti-

tion for a writ of certiorari in this case (No. 73-974), it is to recognize that regrooved tires that conform to the safety standards may be delivered *or* sold—*i.e.*, may be used on the regroover's own vehicles.

3. Petitioners argue (Pet. 11–13) that their regrooved tires are immune from safety regulation under Section 204, because, as certificated motor carriers, they are subject to safety regulations issued under the Interstate Commerce Act. Petitioners point to no inconsistency between the two Acts or the regulations issued thereunder; instead, they invoke only a "potential conflict" between them (Pet. 13).

But there is no reason to anticipate a conflict between regulations governing the quality of regrooved tires prior to their use and separate regulations governing their use by certificated carriers, particularly when both statutes are administered by the Department of Transportation. Furthermore, the court below correctly held (Pet. App. 14a–15a) that the legislative history of Section 204 contradicts petitioners' suggestion that Congress intended to exempt bus and truck operators from the provisions of that section.

4. Petitioners do not claim that Congress is without power to regulate the delivery of regrooved tires for use by intrastate motor carriers. They contend only that Congress did not intend to exercise that power in Section 204 of the Act (Pet. 13–16). That contention was thoroughly considered and correctly rejected by the court of appeals (Pet. App. 21a–33a),[1]

[1] Parts I–III of Judge Robinson's opinion is the opinion of the court with respect to this issue.

on whose opinion we rely. As the court stated (Pet. App. 29a–30a):

> It cannot be gainsaid that a motor vehicle on an intrastate trip, no less than one proceeding interstate, is a constant and serious threat to the traffic movement on its route if its tires are unsafe. The tire that fails is selective neither of the vehicles nor the occupants which it is likely to victimize; an untrustworthy tire jeopardizes closeby interstate and intrastate travel alike. In light of the stated legislative goal of "reduc[ing] traffic accidents and deaths and injuries to persons resulting from traffic accidents," it is incongruous that Congress would restrict the use of regrooved tires on vehicles journeying interstate and at the same time leave closeby vehicles bound intrastate wholly free to use them. * * *

The statutory prohibition against the delivery of nonconforming regrooved tires "for introduction in interstate commerce" (Section 204(a), 15 U.S.C. 1424(a)) must be read, as the court held, "as an injunction, not merely against the operation of such tires and vehicles on interstate journeys, but also against their 'deliver[y] for introduction' into the stream of interstate traffic" (Pet. App. 26a).

5. Finally, petitioners argue (Pet. 17) that operators of buses and trucks who regroove their own tires cannot be said to "deliver" those tires for introduction in interstate commerce. But the court of appeals correctly held that "Congress was referring not to a transfer of legal possession or control, but to any physical transfer or movement of a regrooved tire

for the purpose of introducing it in interstate commerce" (Pet. App. 15a). To read "deliver" the way petitioners contend it must be read would exempt from the Secretary's safety regulation all the tires that are regrooved by operators for use on their own vehicles. There is no basis for supposing that Congress meant to leave so wide a gap in the Act's coverage.

The Secretary's contemporaneous construction of the statutory language is entitled to great weight (*Udall* v. *Tallman*, 380 U.S. 1, 16), and petitioners have not shown that the construction is an unreasonable one.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-794

NATIONAL ASSOCIATION OF MOTOR BUS OWNERS, ET AL.,
Petitioners

v.

CLAUDE S. BRINEGAR, *Secretary of the Department of Transportation*

REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

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REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

The respondent belatedly [1] opposes grant of petition for certiorari of the questions raised by petitioners while noting that he has himself petitioned for certiorari of one of the very questions petitioners advance. In the respondent's petition for certiorari in No. 73-974 he complains of a literal reading of statutory language

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[1] The petition for certiorari was docketed on November 16, 1973 and service on respondent acknowledged on November 19, 1973. The brief in opposition was not filed until February 2, 1974, nearly one month late, without requesting extension of time.

by the Court below leading to the result that sales of regrooved tires may be approved by the Secretary but not nonsale transactions. The petitioning carriers raise the same issue, pointing out that the Court of Appeals reached absurd results by holding that motor carriers may regroove tires for sale to others but may not regroove tires for their own use. Petitioners further contend that, instead of the equally absurd result espoused by respondent, the language and purpose of the statute are served by a reading that only laws other than the Safety Act (principally, the Interstate Commerce Act) apply to petitioners' regrooving of their own specially designed tires for their own use. Although the parties seek different interpretations of the Safety Act, they both raise the same issue and the petition here cannot logically or fairly be denied, as respondent urges, while granting the petition in No. 73-974.

The petitioners raise a number of issues allied to the mutually embraced sale-nonsale issue. These allied issues are whether the Safety Act may be applied to consumers rather than manufacturers and other commercial distributors of motor vehicles and items of motor vehicle equipment; whether the Safety Act *prohibits the use* of regrooved tires even though it *permits the sale* of such tires, as held below; whether regrooving of tires by petitioners effects a delivery for introduction in interstate commerce; whether overlapping jurisdiction under the Safety Act and Interstate Commerce Act, as interpreted by the Court below, should be resolved; and whether the Act applies to wholly intrastate commerce. These questions are not unrelated to the sale-nonsale issue. Indeed, except for the interstate versus intrastate commerce question, all

of them lead up to the ultimate question whether the Act permits sales while prohibiting other types of transactions in regrooved tires. Thus, the Court would necessarily consider these questions anyway in reviewing the sale-nonsale issue.

The respondent's opposition is infected throughout with the contention that petitioners' position would insulate from safety regulation nearly all commercially-used regrooved tires (Brief In Opposition, pp. 6, 7 and 10). As respondent must know, this is simply incorrect inasmuch as petitioners operating in interstate commerce have since the adoption of the Motor Carrier Act in 1935 been regulated in their use of regrooved tires. The same authority, now augmented by state laws, exists and is exercised today. The petitioners' position leaves no gap in regulation.

The respondent indicates his agreement with the majority of the Court below that the Safety Act reaches interstate commerce *and* activities affecting interstate commerce, i.e., intrastate commerce (Brief In Opposition, p. 9). However, as Judge Robb noted below, when Congress wishes a statute to extend to activities affecting interstate commerce it explicitly so states. It has not done that in the Safety Act.[2]

CONCLUSION

In seeking to have this case reviewed on his own terms, respondent ignores issues raised by petitioners which are necessarily involved in the sale-nonsale issue the parties agree this Court should review and he dis-

[2] The Act defines interstate commerce as "commerce between any place in a State and any place in another State, or between places in the same State through another State." 15 U.S.C. 1391(9).

regards the unequivocal exclusion by Congress of intrastate commerce from the reach of the Act. He merely shows disagreement with petitioners on the ultimate resolution of this controversy, not on the question whether this Court should review. In his petition in No. 73-974 respondent contends that the Court should review "the important question concerning the Secretary's regulatory authority under the Traffic and Motor Vehicle Safety Act." (Petition, p. 7). If it is important for respondent it is also important for petitioners. Thus, in final analysis, respondent has shown that he differs with petitioners' interpretation of the Act, but that the questions are important and should be reviewed by this Court.

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